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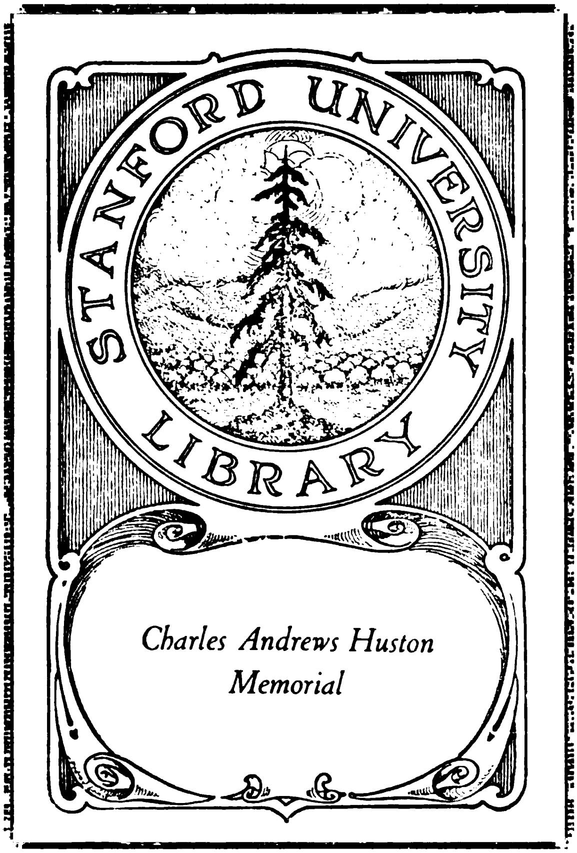

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PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

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FIFTEEN VOLUMES

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Modern American Law

CONSTITUTIONAL LAW

DEFINITIONS AND GENERAL PRINCIPLES

BY

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PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF ILLINOIS.

ORGANIZATION AND POWERS OF THE UNITED STATES GOVERNMENT

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CONSTITUTIONAL GUARANTIES OF FUNDAMENTAL RIGHTS

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EMINENT DOMAIN

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TAXATION

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NATURALIZATION

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PREFACE.

As the basis of our federal and state governments, constitutions and their construction are of increasing importance to every American citizen. To master the subject of Constitutional Law, it is necessary to study not only the text of these written documents, but also the principles underlying their interpretations by the courts.

One entire volume of Modern American Law is devoted to the commentary on Constitutional Law. The subject, as treated, is divided into six parts. Fundamental principles and problems of political science are treated in the first two articles by Professor James W. Garner, of the University of Illinois, entitled, "Definitions and General Principles of Constitutional Law," and "Organization and Powers of the United States Government." The third article, "Constitutional Guaranties of Fundamental Rights," by Judge Emlin McClain, of Leland Stanford Junior University, presents the very important rules of law dealing with the rights of life, liberty and property and their constitutional guaranties. Thereafter, in consecutive order, follow the subjects of especial practical importance, "Eminent Domain" and "Taxation," by Mr. Philip Nichols, of the Boston Bar. "Naturalization" is fully treated by Mr. George F. Tucker, also of the Boston Bar. The text of the Constitution of the United States and its amendments is incorporated within this volume. Other phases of the subject, such as "Interstate Commerce," are treated in later volumes.

This commentary on the important subject of Constitutional Law will serve the profession as well as the general reader, both for extensive study and ready reference.

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CONSTITUTIONAL LAW

PART I

DEFINITIONS AND GENERAL PRINCIPLES

BY

JAMES W. GARNER, PH. D.*

CHAPTER I.

CONSTITUTIONS, THEIR NATURE AND FORMS.

1. **Constitutional law defined.** — Constitutional law is that part of public law which determines the political organization of a state and regulates the political relations between the state and the individuals who compose it. It may be distinguished from administrative law which regulates the relations of the executive and administrative authorities of the government and from international law which, for the most part, consists of rules of intercourse which independent states observe in their dealings with one another. It resembles administrative law in being wholly municipal in character and in being concerned with governmental organization. But it differs from administrative law in that it deals only in a general way with the organization and powers

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of the government viewed in its entirety, whereas administrative law for the most part deals with the organization and competence of the administrative authorities. To a certain extent we may say that administrative law both supplements and complements constitutional law.[1] It differs from international law not only as regards its source and character but in being infra-territorial in its operation, albeit international law is held to be a part of the municipal law of every civilized state and must be ascertained and administered by its courts of justice.[2]

American constitutional law differs from statute law not only as regards its character but also in respect to its source. Whereas statute law consists of enactments passed by the legislature, constitutional law consists mainly of prescriptions framed by a constituent assembly especially summoned for the purpose, or by other special processes for framing constitutional provisions, which prescriptions generally have no validity until they have been formally approved by the electorate by way of referendum. In countries, however, like Great Britain, where no distinction between the constituent power and the legislative power exists, the above mentioned distinction between constitutional law and statute law is not to be found. There the Parliament is both legislative body and constitutional convention and hence constitutional law and statutory enactments proceed from the same source, have the same legal force and are amended or repealed by the same procedure, the only distinction being in the nature of the subjects with which they deal.

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[1] Compare Goodnow, Comparative Administrative Law (1897), vol. I, chap. 1; see also Dicey, Law of the Constitution, § 5.

[2] Hilton v. Guyot, 159 U. S. 113; the Paquete Habana, 175 U. S. 677, and the English case, West Rand Gold Mining Co. v. Rex, L. R. 1905, 2 K. B. 391.

Viewed from the standpoint of their content and nature the distinction between constitutional law and statute law is a fundamental principle of our system of public law although naturally there are no precise rules for determining what matters shall be dealt with by the one and what by the other.

2. **Subjects of constitutional law.**—Among the subjects which usually fall within the domain of constitutional law are: the organization of the government, at least in its broader outlines; the distribution of powers among its several departments; the regulation of the mode of choice, the terms and qualifications of its principal officers; the fixing of the suffrage and the determination of the political rights and privileges of the citizens. As a matter of fact, however, some or all of these matters, and many others of scarcely less fundamental importance, are frequently dealt with, wholly or in part, by statute, so that much of our statute law, especially that of the United States, does not differ intrinsically from constitutional law. It is statutory only because it has been enacted by the legislature rather than by a constituent body; in so far as it is organic and fundamental in character it is in fact constitutional law in everything but name.

On the other hand, much that is now found in the state constitutions has no real organic or fundamental character and is constitutional law, therefore, only because it has been incorporated in the constitution instead of in the statutes where logically it more properly belongs. One effect of the increasing tendency in recent years to deal with mere matters of private law through constitutional regulation has been to destroy in great measure the distinction between the intrinsic character of constitutional law and statute law, especially in the states.

3. **Constitutions—Early meanings.**—The term "constitution" was at first applied to certain acts or statutes of the English Crown, as for example, the "Constitutions of Clarendon" issued by Henry II for the regulation of the rights of the clergy.[3] It was later employed in certain of the charters granted in the seventeenth century to the American colonies and in various political treatises like those of Sydney and Harrington. The famous "Agreement of the People" framed by Cromwell's soldiers in 1647; the "Instrument of the People" promulgated by Cromwell for the Protectorate in 1653; the "Fundamental Orders" of the Connecticut Colony in 1639, and of course, the charters granted by the crown to the American colonies were, in a way, the precursors of written constitutions in America.[4] Gradually, the term came to be applied to the body of fundamental laws framed, not by legislative bodies, but by constituent assemblies, for the determination of the political organization of the state and for the regulation of the political relations between the state and its citizens. The first examples of constitutions in the modern sense of the

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[3] Stubbs, Select Charters, pp. 137-140.

[4] Compare Borgeaud, Adoption and Amendment of Constitutions, chap. 1.

term were the instruments of government framed by the American states following their separation from Great Britain in the latter part of the eighteenth century.

4. **Definition of a constitution.**—As the term is now used a constitution may be defined as "the fundamental law of the state, containing the principles upon which government is founded, regulating the division of sovereign powers and directing to what persons each of these powers is to be confided and the manner in which it is to be exercised;" or, more briefly, the "body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."[5] Sir James McIntosh defined a constitution as the "body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and most essential privileges of the subjects."[6]

Charles Borgeaud, a well known Swiss writer, defined a constitution to be: "the fundamental law according to which the government of a state is organized and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, a precise text or series of texts enacted at a given time by a sovereign power; or it may be the more or less definite results of a series of legislative acts, ordinances, judicial decisions, precedents, and customs of diverse origin and of unequal value and importance."[7] Mr.

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[5] Cooley, Constitutional Limitations (7th ed.), p. 4.

[6] Law of Nature and of Nations, p. 65.

[7] Origin of Written Constitutions in the Political Science Quarterly, vol. VII, p. 613.

Justice Miller of the United States Supreme Court, having in mind more particularly the American conception, defined a constitution to be a "written instrument by which the fundamental powers of government are established, limited and defined, by which those powers are distributed among several departments for their more safe and useful exercise for the benefit of the body politic."

5. **Necessity of a constitution.**—It goes without saying that every fully organized independent state must have a constitution or body of fundamental laws according to which its government is organized and political power exercised. Furthermore, the subdivisions of those states which have the federal system of government, although strictly speaking not states themselves, since they are neither sovereign nor independent, also have constitutions, and the same is true of the self-governing colonies of states like Great Britain, even though such constitutions are in legal theory nothing more than enactments of the imperial Parliament, that is, nothing but statutes. While a constitution is an essential part of the legal framework of every state it may in fact be very rudimentary and undeveloped in character. Thus Lecky speaks of the English Constitution as being "still unformed" at the time of the Restoration, by which he meant that it was still incomplete and in process of development.[8] In fact, all constitutions are incomplete; they are living organic things always in the process of growth and development and hence never become fixed and stationary.

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[8] Compare Macy, The English Constitution, p. 452.

6. **Further distinctions.**—A constitution may be viewed as an objective fact or as an instrument of evidence, that is, as a document or collection of documents in which are embodied the fundamental prescriptions relating to the organization of the state. A distinction may also be made between the actual working constitution, on the one hand, and the formal constitution on the other. Viewed in its former aspect the constitution consists not only of the written prescriptions embodied in the formal text but also the usages and customs that have grown up about it and which have in fact become a part of it, as it is observed in practice. It is the written constitution as it has expanded and developed under the operation of historical influences to meet new conditions and circumstances. Viewed as a formal instrument the constitution is merely the legal document stripped of its customary or conventional element; it is the "literary" constitution and as such is a stationary thing rather than the actual constitution which is administered and obeyed. In this respect it is like a legal instrument, for example, a contract, which always remains the same, unaffected by the changing conditions of time.

7. **Forms and types of constitutions.**—Constitutions as instruments of government have been classified as cumulative or evolved, as conventional or enacted, as written and unwritten, as flexible and rigid, etc. A cumulative or evolved constitution is one which originated mainly in custom and the prescriptions of which consist principally of accumulated usages, conventions, common law principles, judicial

precedents, etc. Such constitutions are largely the product of historical development and growth rather than of formal enactments by an assembly or of grant by a sovereign ruler. They have no fixed starting point, they were never "struck off" at a given time and they expand by slow and gradual accretion rather than by formal amendment. Enacted constitutions, so called, are those which have come into existence through deliberate enactment by an assembly, with or without a popular referendum, or which have been granted by a king, emperor or other hereditary ruler.[9] This classification of constitutions coincides in most particulars with the more common division into unwritten and written constitutions.

8. **Written and unwritten constitutions.**—An unwritten constitution is one most of whose provisions, but by no means all, have never been reduced to writing, at least have never been collected and embodied in a single document. Like the cumulative or evolved type, with which it is largely identical, it consists mainly of customary rules, judicial decisions, etc., to which must be added certain statutory enactments of a fundamental character usually bearing different dates. It is the type which Sir Henry Maine called historical or evolutionary constitutions, that is, constitutions which have developed through the accumulation of experience.[10] A written constitution, on the other hand, is one most of whose provisions, but certainly not all, if the constitution has attained considerable age, have been reduced to writing and formally

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[9] Compare Jameson, Constitutional Conventions, § 72.

[10] Popular Government, p. 172.

embodied in one or more written instruments. The distinction between these two forms of constitutions corresponds in many respects to that between the common law and the statute law, between the *lex non scripta* (unwritten law) and the *lex scripta* (written law) of the Romans; some writers like Bryce have not inappropriately designated the latter type as "statutory" constitutions and the former as "common law" constitutions.

The provisions of a written constitution are usually embodied in a single text but examples of written constitutions made up of distinct enactments bearing different dates are by no means lacking. The present constitution of France, for example, consists of three different "constitutional laws," one of which deals with the organization of the Senate, another with the organization of the public powers and the third with the relations of the public authorities, and the last mentioned was enacted at a different date from the others. Likewise the constitution of Austria is collectively composed of five different fundamental statutes dealing with different subjects though they all bear the same date of enactment. So the constitution of Hungary consists of a collection of statutes and diplomas covering a period of nearly seven centuries.[11] A final distinction between a written and an unwritten constitution lies in the fact that usually the provisions of the former have a higher legal authority in respect to the ordinary statutes than do those of an unwritten constitution, and are amendable by a different procedure. Consequently in countries where the written type prevails, to be valid, the statutes must conform to the provisions of the constitution.

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[11] See the texts in English in Dodd, Modern Constitutions, vol. I, pp. 93-111.

9. **Sources of written constitutions.**—While in states having a written constitution there is generally a distinction between a constituent power and the legislative power there are some examples of written constitutions which have not been enacted by constituent bodies, or, as we say in America, by constitutional conventions, but by ordinary legislative assemblies and which do not therefore differ from simple statutes in any legal sense. Such are the constitutions of Austria and Hungary which are, legally speaking, nothing but statutes enacted by their Parliaments. There are others like that of Italy which although not enacted by the Parliament may be amended according to the same procedure observed in the alteration of statutes, and the constitution of Spain, which contains no express provision for its own amendment, probably falls in the same class.

Although most written constitutions have had their source either in a constituent or a legislative assembly there are not lacking examples that have been granted to the people by sovereign rulers often as a means of preventing threatened revolt. Some authorities have denied that such compacts or charters are true constitutions since often the grantor reserves the right to revoke or amend them at will and therefore they have no permanent character.[12] Examples of such constitutions were the charters of 1814 and 1830 granted by the Kings of France, the present constitution of Italy granted by Charles Albert in 1848, that of Prussia granted by the King of Prussia in 1849 and the more recent constitutions of Japan, Russia, Turkey and Persia.

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[12] Compare Cooley, Constitutional Limitations, p. 5, n. 2.

10. **The British constitution.**—The best existing example of an unwritten constitution is that of Great Britain. It consists, says James Bryce, of "a mass of precedents carried in men's minds or recorded in writing, dicta of lawyers or statesmen, customs, usages, understandings and beliefs and a number of statutes mixed up with customs and all covered over with a parasitic growth of legal decisions and political habits."[13] Dicey speaks of it as a sort of maze in which the wanderer is perplexed by unreality, antiquarianism and constitutionalism.[14] He raises the question as to whether what is called English constitutional law is really law at all; it is, he says, rather a cross between history and custom. Nevertheless the term is employed in England to define the members of the sovereign power and to regulate their relations with one another, it includes the rules which determine the mode in which the sovereign power is exercised, which prescribe the order of succession to the throne, which regulate the prerogatives of the chief magistrate, define the territory of the state, etc. Such of these rules, whether written or unwritten, as are enforced by the courts Dicey calls the *law* of the constitution; the others, consisting entirely of habits,

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[13] Essay on Constitutions in his Studies in History and Jurisprudence, vol. I.

[14] Law of the Constitution (2d ed.), p. 7.

understandings or practices, and which are not enforced by the courts, he calls the *conventions* of the constitution. The former includes such rules as those which relate to the irresponsibility of the king and the responsibility of his ministers (all of which are unwritten); the latter, such as relate to the royal veto, the initiation of revenue bills and the resignation of ministers.

The constitution of England is not a work of human art, nor the result of deliberation; it was never made in the sense in which written constitutions are made but has grown up bit by bit through many centuries. Some of it, to be sure, is written but what is written has never been collected and embodied in a single document. The unwritten part is the more important. Thus the organization, powers, relations and interactions of the Crown, Cabinet and Parliament are regulated almost entirely by custom. Boutmy, a French commentator on the British constitution, remarks that the English have "left the different parts of their constitution where the waves of history have deposited them; they have not attempted to bring them together, to classify or complete them or to make of it a consistent whole."[15] The parts that are written are mostly statutes enacted by Parliament and may be altered and repealed in the same way as other statutes; in other words, there is, as was said in a preceding section, no distinction in England between the constituent power and the legislative power, both being vested in the Parliament. Nevertheless there is a growing feeling in England that the constitution ought to be changed only in obedience to a mandate from the electorate.[16]

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[15] Constitutional Studies (2d ed.), p. 6.

Naturally in countries like England where the constituent power is not separated from the legislative power there is no precise juristic test by which a constitutional prescription may be distinguished from an ordinary statute as is the case in the United States where they proceed from different sources and are altered or repealed according to different processes. In England the test is whether the act is fundamental in its effect, that is, whether it relates to the organization of the state or the exercise of its sovereign powers. In practice, however, it is not always easy to draw the line between that which is fundamental and that which is not. We would have no hesitation in assigning to the domain of constitutional law such great statutes as Magna Charta, the Habeas Corpus Act, the Act of Settlement and the Parliament Act, so called, of 1911; but there is a difference of opinion as to whether the suffrage and redistribution acts of 1832, 1867 and 1884 and the local government acts of 1888 and 1894 should be classified as constitutional or merely statutory.

It follows, furthermore, from the fact that the Parliament is both the constituent body and the legislature that a statute cannot be unconstitutional in the same sense in which an American statute may be. English statutes are sometimes said to be unconstitutional not because they are inconsistent with some higher positive law, for there can be no such law, but rather because they are supposed to be contrary to some immemorial custom of the realm or in violation of the principles of morality or of natural law. They are not unconstitutional because they are illegal for no act of Parliament can be illegal, not even an act making a man a judge in his own case or one depriving a man of life, liberty or property without due process of law, and the courts would not listen to an argument based on the ground that they were illegal. They might be attacked as being in violation of ancient and well established customs but the courts would presume that Parliament had intended no such violation and they would give effect to them as to any other statute.

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[16] Compare Lowell, Government of England, vol. I, p. 4.

11. **Flexible and rigid constitutions.**—Finally it may be observed that the old classification of constitutions as written and unwritten has been criticized on the ground that the distinction rests upon no logical or scientific basis and does not always mark a contrast between fundamentally different types. As a matter of fact all written constitutions, at least those that have attained considerable age, have become modified or supplemented by custom and judicial interpretation; that is, they have acquired an unwritten element, so that it is no longer accurate to describe them as written. This is especially true of the constitutions of the United States, Hungary and Italy. One high authority on the Constitution of the United States maintains indeed that the conventional element in this constitution is now quite as large as that in the English constitution.[17] Whether this be true or not, to hold that it has not been modified or has

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[17] Wilson, Congressional Government, p. 7.

not expanded through custom and tradition would be to close our eyes to one of the most obvious historical facts in our constitutional development. The fact is, if the Federal Constitution were stripped of its conventions and displayed in its legal nakedness it would be unrecognizable and much of it would be meaningless or unworkable. On the contrary, all unwritten constitutions are in fact composed of a large written element, that is, what was once custom has been embodied in written texts. Sir Henry Maine has pointed out that much of the English constitution, particularly that which relates to the powers of the Crown, the House of Lords, and the courts, has been reduced to writing,[18] and the same may now be said of the relations between the two Houses of Parliament since the Parliament act of 1911. It is, of course, true that the written part of the English constitution is less in quantity than the unwritten element and that what has been written is scattered through many documents of different ages but it is none the less considerable in quantity and important in quality. The essential difference therefore between the so-called unwritten constitution of England and the written constitutions of the United States, Hungary and Italy is not so much that the former is conventional and the latter written but because the conventions of the one are more numerous and all-pervasive than those of the other.[19]

The classification of constitutions, therefore, as written and unwritten is unscientific and illogical.

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[18] Popular Government, p. 125.

[19] Compare Lowell, Government of England, vol. I, p. 9.

It has been suggested that a more useful classification would be that of "flexible" and "rigid" constitutions, the test being not the amount of the written or unwritten element which they contain but their relation to the ordinary laws. Thus constitutions which proceed from the same source, which have no higher legal authority and which may be altered or abrogated in the same way as ordinary laws, irrespective of whether they consist largely of conventions or of written prescriptions, might be classed as flexible or elastic constitutions. On the other hand, those which are framed by a different body, which are legally paramount over ordinary laws and which are repealed or amended according to different processes might be classified as rigid or inelastic constitutions. In the first group would fall the constitutions of England, Hungary and Italy and possibly others like those of Prussia and Spain, all of them except that of England being now commonly classified as written constitutions; to the second group would probably be assigned all the other written constitutions of the world.[20] The former are flexible because they are alterable with the same ease and facility as ordinary statutes; the latter are rigid and inelastic because they can be amended only by a different and much more difficult process.

12. **Strength and weakness of written constitutions.**—Among the advantages of a written constitution may be mentioned the elements of certainty and precision. Its provisions are usually framed with care, after much deliberation, and hence their

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[20] This is the suggestion of Bryce in his Essay on Constitutions cited above.

meaning is much less likely to be drawn in question than those which consist merely of customs and traditions. Such a constitution is therefore less elastic and its provisions cannot be bent and twisted by the courts to meet the momentary demands either of the government or of classes, and therefore they offer a more effective guarantee to private rights. Being more difficult to amend than ordinary laws they are more likely to be stable and less exposed to the dangers of hasty and frequent change. But this advantage sometimes proves to be a source of weakness since the difficulty of amendment may retard or prevent desirable alterations in the interest of growth and progress. Excessive rigidity may also accentuate the temptation to violate or override the constitution when it has been outgrown and no longer fits the conditions of the time. It may even become a cause of revolution when no other means remains by which it can be altered or abrogated.

The chief advantage of an unwritten constitution is its flexibility and elasticity. Capable of being altered with the same ease and facility with which ordinary laws are amended, it can be changed as the life of the nation changes and thus be always adapted to the conditions which exist in society at any given moment. The facility of amendment provides a means of legal and orderly growth and removes the temptation to revolution. Such constitutions can be "stretched or bent so as to meet emergencies without breaking their framework; and when the emergency has passed, they slip back into their old form like a tree whose outer branches have been pulled aside to let a vehicle pass."[21] Unlike written constitutions they are not framed as if they were the starting point in the life of the state or as if they could be fashioned by the hand of man to fit an ever-changing society as a strait-jacket is made to fit an individual. Judge Cooley has well remarked that "of all the constitutions which may come into existence for the government of the people, the most excellent is obviously that which is the natural outgrowth of the national life and which, having grown and expanded as the nation has matured, is likely at any particular time to express the prevailing sentiment regarding government and the accepted principles of civil and political liberty." "And," he adds, "the least valuable is that which turns its back upon the national experience, dissevers the national future from the past and lays the framework of the government in ideal perfection."[22]

Unwritten constitutions, however, are not without their elements of weakness. They may be easily altered to meet temporary fancies and are therefore exposed to the dangers of popular passion. They have also been criticized, rather unjustly, by some writers as the "playthings of judicial tribunals,"[23] and there is a popular belief, quite unfounded, that they allow a wider discretion to the administrative authorities than do those of the written type. It is also sometimes claimed that they are unsuited to democracies because the masses are distrustful of a constitution whose provisions rest mainly upon custom and tradition.

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[21] Bryce, Essay on Constitutions, p. 22.

[22] The Comparative Merits of Written and Prescriptive Constitutions, 2 Harvard Law Review, 356.

[23] See Jameson, Constitutional Conventions, § 77.

Concerning the relative merits of the two types Judge Jameson remarks: "For a community whose political training has been carried to a high degree of perfection, in my view, an unwritten constitution would, on the whole, be preferable. * * * But for a community whose training has been imperfect or which is subject to fits of political apathy, alternating with those of intense zeal for reform, a written constitution is doubtless the better one."[24] The constitution of Great Britain remains the only example of the unwritten type though it is not the sole example, as we have shown, of a really flexible constitution.

13. **Essentials of a written constitution.**—A constitution is supposed to contain only the fundamental or organic law of the state, or rather that part of it which deals with the organization and powers of the government in its broader outlines and which regulates the political relations between the state and the people who are subject to its jurisdiction. Strictly speaking a constitution should contain only very general prescriptions relating to such matters as the structural organization of the state, the distribution of the powers of government among the different organs, their spheres of operation, limitations upon its authority, definition of the suffrage, terms, qualifications, modes of selection and removal of the principal public officers, the procedure for making constitutional amendments, and the like. All matters of secondary

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[24] Constitutional Conventions, § 78.

and subsidiary character should be left to statutory regulation.

A typical American constitution contains: (1) a bill of rights; (2) a clause distributing the powers of government among the legislative, executive and judicial departments; (3) a group of provisions defining the organization of the several departments of the government, conferring certain powers upon each of them and sometimes imposing certain limitations upon their authority; (4) a provision or provisions defining the electorate; (5) a provision outlining the mode of procedure by which amendments to the constitution may be made; and (6) a group of miscellaneous provisions dealing with such matters as local government, public education, election, legislative appropriations, legislative procedure, impeachment, finance, corporations, the militia and frequently many other matters which under the earlier constitutions were left unregulated or were dealt with by statute.

14. **The bill of rights.**—The bill of rights, now considered an essential part of every American constitution, is a series of declarations setting forth certain fundamental and inalienable civil and political rights of the citizen; it imposes upon the government a prohibition from interfering with the enjoyment of such rights or defines the mode of procedure to be followed by the government when it undertakes to deprive an individual of his life, liberty or property. It usually contains declarations guaranteeing religious liberty, the right of assembly and of petition, of speech and of press, the right of the accused to trial

by jury, exemption from searches and seizures except under certain specified conditions, the benefit of bail, of the writ of habeas corpus, indictment by grand jury, the right of counsel and various other guarantees which collectively constitute the rule of due process of law in judicial procedure.

There are also usually prohibitions against imprisonment for debt, against ex post facto legislation, bills of attainder, cruel and unusual punishments, the quartering of soldiers in private houses, against the taking of private property except for public use and then only after compensation, etc. Finally, the bill of rights usually contains certain enunciations of political theory such as the declaration that all men are by nature free and equal and are entitled to certain inalienable rights, among which are life, liberty and the pursuit of happiness; that to secure these rights governments have been instituted among men, deriving their just powers from the consent of the governed; that governments are founded in compact; that perpetuities and monopolies are contrary to the genius of free republics; that no man or set of men are entitled to exclusive privileges; that public officers are the trustees and servants of the people; that whenever the ends of government have been perverted and all other means of redress are ineffective revolution is not only a right but a duty; that a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty; and other declarations of a similar kind.

The bill of rights is thus a constitution of liberty and as such complements the constitution of government. It was originally intended to furnish guarantees in behalf of individual liberty, against arbitrary executive power, of which there was much fear during the period following the Revolution, and since the danger from executive tyranny has long ago disappeared it has seemed strange to certain foreign writers on American government that such declarations should continue to be repeated and multiplied in the newer state constitutions. To such observers the only reason is the American fondness for enunciating the maxims of political equality and principles of government. But this is a superficial view, for, whereas the danger from executive aggression has largely disappeared, that from legislative interference has greatly increased and it is for protection against this danger that the bill of rights is still justified.

The American people have always attached great importance to bills of rights and they have occupied a conspicuous place in every state constitution framed since 1780, with the exception of those of Louisiana of 1812, 1845, 1852 and 1864, and in each of these there were scattering provisions containing certain guarantees for the protection of individual liberty. James Bryce observes that they are historically the most interesting parts of the American constitutions, being as they are "the legitimate child and representative of Magna Charta and the English Bill of Rights."[25]

The absence of a bill of rights from the Federal Constitution as it was adopted in 1789 was one of the chief objections raised against its ratification, although as Hamilton pointed out in "The Federalist" the objection was not well founded for the reason that the federal government being one of delegated powers it would be superfluous to prohibit it expressly from exercising powers which had not been conferred upon it by the Constitution. But his explanation did not remove the popular dissatisfaction and the adoption of the first ten amendments in 1790 provided the Constitution with what is in effect a bill of rights.

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[25] The American Commonwealth, chap. 36.

15. **Federal and state constitutions compared.**—In respect to its content the Constitution of the United States is a model of written constitutions. No attempt was made to embody among its provisions prescriptions relating to any but the most fundamental matters of political organization and of individual rights. It contains little or nothing in regard to trade, industry, corporations, education, very little concerning the election of Senators, Representatives or Presidential electors, little in regard to legislative procedure and nothing in regard to the nomination of candidates for President and Vice President.

The state constitutions, especially the more recent ones, however, contain numerous provisions that can scarcely be regarded as fundamental in character at all and according to the test mentioned above they belong more properly to the statutes. The early state constitutions were, to be sure, brief documents containing only provisions of a very general character, but with passing time they have increased in volume so that some of the more recent ones have acquired somewhat the character of codes of public and private law. The constitution of Virginia, for example, has grown from a document of about fifteen hundred words to one of more than thirty thousand. The present constitution of Alabama contains about thirty-three thousand words, that of Louisiana about forty-five thousand and that of Oklahoma about fifty thousand. The latter constitution contains an article of seven sections on federal relations, a series of provisions dealing with the initiative and referendum; a section describing the seal of the state; a list of those who may accept railroad passes; an article on insurance; one on manufactures and commerce; and one on alien and corporate ownership of lands. It also contains an enumeration of the powers of the legislature, thus making it to some extent a body of delegated rather than of residuary powers.

Two reasons are responsible for the tendency to transform the state constitutions from simple instruments of government into codes of public and private law. The first has been the increasing popular distrust of the legislatures on account of their frequent failure to represent properly the people, the remedy for which has been sought in the imposition of detailed restrictions upon their power and the regulation through constitutional provision of many matters which have heretofore been dealt with by statute. The second reason is due to the changed economic conditions which have transformed the simple society of one hundred years ago into a very complex economic and social organism and which has in turn given rise to numerous subjects that must be dealt with by the constitution. The growth of great cities, the rise of the industrial system, the organization of powerful corporations and combinations in restraint of trade, the development of railway and telegraph systems, have produced conditions which affect too deeply the public interests to leave their regulation entirely to the legislature. Furthermore, the higher average of character and ability found among the members of a constitutional convention as compared with that of a legislature has created a demand for more legislation through this body.[26] The state legislatures in consequence have been shorn of their power to deal with many matters of real importance, and the length of the constitution has increased correspondingly.

16. **The origin of the state constitutions.**—In the United States each individual state has its own constitution embodying its own ideas of government and liberty. In the framing of its constitution each is free to adopt such a system of government as it sees fit, subject to the limitation that the government which it sets up must be republican in form and that the provisions which it contains must not violate the federal prohibitions imposed on the states.

In point of origin the constitutions of the original states antedated that of the United States and furnished many of the ideas which were incorporated into the latter instrument. They are as James Bryce has remarked the oldest things in the political history of America for they are the continuations and representatives of the royal charters granted by the English Crown to the earliest settlers. Their pedigree even goes back to the charters of the trade guilds of the middle ages,[27] thus demonstrating the truth of the principle that constitutions are the result of growth rather than of invention. When the colonies threw off their allegiance to Great Britain the more liberal charters like those of Connecticut and Massachusetts became the models for the constitutions framed by the now independent states. They were of course largely altered and adapted to the new situation caused by the Revolution, though the charter of Massachusetts was retained without change until 1780, that of Connecticut until 1818 and that of Rhode Island until 1842.

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[26] Compare Dealey, Our State Constitutions, p. 1.

Soon after the outbreak of the Revolution the colonies applied to the Continental Congress for advice and this body by a resolution of May 10, 1776, reciting that the King and Parliament had excluded the inhabitants from the protection of the Crown and had refused to answer their humble petition, advised the colonies to suppress totally the authority of the Crown and set up such governments as were suitable to their independent situation. In pursuance of this advice each of the states except Connecticut and Rhode Island proceeded to frame constitutions of their own and before the close of the Revolution the work had been completed. The very liberal charters of the two states mentioned were in fact constitutions in everything except name and they were retained as such until long after the Revolution.[28]

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[27] American Commonwealth (abridged ed.), p. 297.

[28] For the procedure by which these constitutions were framed, see Dodd, Revision and Amendment of State Constitutions, chap. 1. See also two articles by Morey and Webster on the Revolutionary State Constitutions in the Annals of the American Academy of Political and Social Science, vols. IV and IX; and Jameson, Constitutional Conventions, §§ 120 and following.

17. **Character of the early state constitutions—Stages of development.**—These early constitutions were framed under the stress of the Revolution, somewhat hastily and in some cases according to methods which would now be considered irregular and, with the exception of that of Massachusetts, which still remains in force, they were all soon displaced by newer and more perfectly framed instruments. They were very brief documents and embodied only very general principles of political organization, everything else being left to statutory regulation. They all contained elaborate bill of rights and bore evidences of democratic distrust such as are entirely absent from the constitutions now in force.

In a rough way the state constitutions have gone through three stages of development. The constitutions of the period following the Revolution were characterized by a natural dread of executive and military power and manifested a distrust of democracy. They confided to the legislature, not only the whole power of legislation without any limitations but also the power of appointing the principal state officers from the governor down. Except in Massachusetts the governor was denied the veto power and all positive control over legislation and of course he was given practically no power of appointment.

The second stage of development covered roughly the first half of the nineteenth century. This was a period of extraordinary democratization along all lines. The principle now became established that constitutions and constitutional amendments must be ratified by popular vote. The election of the governor and other state officers including even the judges in many states was taken from the legislature and entrusted to the people and at the same time the bulk of local officers was made elective by popular vote. Property qualifications for voting and office holding were abolished and practically universal suffrage for white men was established. There was everywhere a tendency to shorten official terms and introduce frequent elections. The principle of the referendum for ordinary legislation was also introduced and the increasing length of the constitutions afforded further evidence of a growing distrust of the legislature and of the tendency to substitute the constitutional convention in the place of the legislature as an organ of legislation for many subjects that had formerly been dealt with by statute.

The third period of constitutional development followed the Civil War and was marked both by a tendency toward reaction in certain directions and further democratization of institutions. The reactionary tendency manifested itself not against the principle of popular control but rather against the earlier policy of depriving the executive of certain powers which time and experience had shown that he ought to possess. Thus his term was now quite generally extended, his power of veto was more widely introduced and his power of appointment and control enlarged. The most significant tendency, however, was the growing practice of imposing constitutional limitations on the competence and procedure of the legislature which, from once having been the depositary not only of an unlimited power of legislation but also the chief appointing authority, had now come to be regarded with more or less distrust and want of confidence. Its power to enact special legislation on an ever increasing number of subjects was either taken away entirely or subjected to restrictions and its power of general legislation was also restricted by numerous limitations. In some of the newer constitutions like that of Oklahoma the limitations on the legislative power are so numerous that the early constitutional theory which regarded the legislature as an authority of residuary powers has almost been undermined. This period of constitutional development has been characterized by an extraordinary extension of the principle of the referendum as a means of legislation and by the introduction of the initiative, nominations by direct primaries, the recall and other institutional forms of democracy. Simultaneously with this development the texts of the constitutions have expanded and increased in length; many matters formerly dealt with in brief terms by the constitution are now regulated in detail; others which were formerly left entirely to statutory regulation are now dealt with by the constitution.

18. **Framing of state constitutions—Stages of procedure.**—The procedure by which the American state constitutions have been framed and put into force has gone through several stages of development. During the Revolutionary period the procedure, judged by present methods and standards, was in most instances irregular. Several of the original constitutions were framed by the legislatures and in legal theory, therefore, were nothing more than

statutes, while some were framed by bodies not expressly authorized to do so. Moreover, of those framed before 1784, only two—those of Massachusetts and New Hampshire—were formally submitted to a vote of the people. The now fundamental distinction between constitutions and statutes, between the constituent power and the legislative power was not then fully recognized. Nor was the idea of a convention as something distinct from a legislative body fully developed. Even where the convention was employed for constitution making it was sometimes called by irregular processes and was not therefore a really constituent body.

The second stage, which began roughly with the nineteenth century was marked by the development of the convention as a body distinct from the legislature and all the constitutions adopted since that time have been framed by such bodies. The third stage saw the adoption of the principle that the constitution should be submitted to a vote of the people and approved by them before being put into effect. Until 1860 this practice was uniformly followed although there were some exceptions. The secession constitutions were not generally submitted to popular vote though the reconstruction constitutions were required to be so approved. Since the close of the reconstruction period the rule requiring popular submission has been departed from in a number of instances, notably by the conventions of Mississippi (1890), South Carolina (1895), Delaware (1897), Louisiana (1898), and that of Virginia (1902).

Few of the Revolutionary constitutions contained any provision for calling conventions and some of those of a later period likewise contained no such provisions. Indeed, twelve constitutions now in force make no provision for assembling conventions. Naturally therefore the question has arisen as to whether in the absence of such provisions a convention may nevertheless be called. The generally accepted rule is that where the constitution contains no provision for calling a convention, but has no provision expressly confining amendment to a particular method the legislature may provide for a convention and in fact there have been many such cases.[29] However, to avoid such questions most constitutions adopted since 1784 have made definite provision for calling conventions. Some give the legislature power to call conventions without submitting the question to popular vote; some permit the legislature to submit the question of calling a convention to a popular vote (a provision now found in twenty-six constitutions), while others require the question to be submitted to a vote of the people at regular intervals (now found in six constitutions). Thirty-two constitutions now require popular approval of calls for conventions and this may be said to be the settled rule. In Maine and a number of Western states resolutions to call conventions may be initiated and approved by popular vote, so that the matter is removed, to a large extent entirely from legislative control. The constitutions of New York and Michigan contain largely self executing provisions which remove the question entirely from the power of the legislature after the people have once voted in favor of a convention.

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[29] Dodd, The Revision and Amendment of State Constitutions, p. 44; Jameson, Constitutional Conventions, p. 210. But see the opinions of the Massachusetts and Rhode Island Justices to the contrary, 6 Cush. 573 and 14 R. I. 649.

19. **The legal position of the constitutional convention.**—By its very nature a constitutional convention is a constituent body assembled for the single purpose of framing a constitution. Does it supersede the existing constitutional organs of the government? Judge Jameson contends that the convention is absolutely bound by the restrictions imposed upon it by the legislative act by which it is called.[30] But in fact where such restrictions have been imposed they have been so often disregarded that this view cannot be accepted. Moreover the courts of a number of states have declined to hold invalid constitutions framed in violation of statutory restrictions. The better opinion is that the convention is neither sovereign nor subordinate to the legislature but that it is independent within a sphere peculiarly its own.[31]

It is clear, however, that a convention is bound by the provisions of the existing constitution in pursuance of which it sits and that it is subject to the restrictions implied in the limited character of its functions. In a number of instances conventions have exercised or sought to exercise regular legislative and sometimes even executive powers but this practice has generally been condemned by public opinion and occasionally by the courts. The better view is that a constitutional convention does not supersede the regular executive, legislative and judicial organs of the state and when it assumes to do so it transcends the authority implied in its own limited functions. Nevertheless, while it may not properly enact a law there is nothing to prevent it from embodying its ideas in the form of a constitutional provision and thus accomplishing indirectly what it cannot do directly.

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[30] Constitutional Conventions, pp. 362 and following.

[31] Dodd, The Revision and Amendment of State Constitutions, p. 80.

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CHAPTER II.

AMERICAN CONSTITUTIONS AND CONSTITUTIONAL LAW.

20. **Origin and formation of the Federal Constitution.**—The Articles of Confederation which served the purpose of a Constitution for the United States between 1781 and 1789 supplied in an imperfect way the need of a general government and demonstrated the value of common action, but the weakness of the union which they created and the impotency of the government which they provided brought the country in a few years to the verge of anarchy. Under the Articles each state practically retained its own sovereignty and there was no means of compelling it to perform its obligations to the Union. Congress had no power of taxation and the only means of replenishing the treasury was by voluntary contributions from the states, some of which contributed little or nothing and those which responded did so tardily and grudgingly. Likewise Congress had no power to regulate commerce either with foreign countries or among the states themselves. Each state therefore framed its own trade regulations with reference to its own interests, the result being frequent reprisals and retaliations upon one another. They violated the treaty with Great Britain and Congress had no power to prevent it, a fact which led Great Britain to refuse to fulfill her treaty obligations.

The organization of the government established by the Articles was defective in many particulars. There was no executive or executive machinery and consequently Congress was dependent upon the good will of the states to enforce its laws. Except a court of appeals in cases of capture the confederation had no judiciary and again dependence was had upon the state courts. Disregarding the principle of checks and balances the Articles created a single chambered Congress for legislative purposes. Disregarding also the differences of population among the states the Articles enacted that each state should have one vote in the Congress. The representatives were paid by the states which sent them and they were subject to instructions and to recall. Thus the Congress had more the character of a body of plenipotentiaries than that of a legislature. It required the vote of nine states to pass any important act of legislation and no amendment of the Articles was valid until it had received the assent of every member of the confederation. Two attempts were made to amend the Articles so as to give Congress power to levy a duty on imports but both attempts failed through the opposition of a single state.

21. **The Constitutional Convention of 1787.**—In September, 1786, a convention of delegates representing five states was held at Annapolis to take into consideration the question of uniform trade regulation among the states. The convention was so poorly attended that it did not enter upon a consideration of the business for which it had been called but before adjourning it adopted a resolution calling upon the

states to choose delegates to a convention to be held in Philadelphia in May of the following year to propose "such changes in the Articles of Confederation as might render them adequate to the exigencies of the union."

Congress tardily approved this resolution and called upon the states to choose delegates to this convention for the sole and express purpose of revising the Articles of Confederation which alterations were to be reported to Congress and when adopted by itself and confirmed by the states should be put into operation. In pursuance of this call all the states except Rhode Island chose delegates and the convention assembled at Philadelphia in May, 1787. The instructions of the delegates limited their powers to a mere revision of the Articles of Confederation, but the convention did not regard such instructions as binding and it proceeded to frame an entirely new constitution. Soon after the convention was organized it was discovered that there was a wide difference of opinion among the delegates from the larger and more populous states and those from the smaller states, in regard to their powers and also in regard to the character of the revision which seemed to be necessary.

In general the delegates from the smaller states insisted that in principle the Confederation was sound and consequently all that was needed was a mere revision of the Articles so as to give Congress larger powers of taxation, the power to regulate commerce, etc. The delegates representing the larger states, however, felt that the retention of the principal features of the Confederation would not remove the existing evils and they therefore demanded that the Articles be entirely set aside and a new and radically different type of government substituted. Their views were embodied in the so called Virginia "plan" which declared that a national government ought to be established consisting of a supreme legislature, executive and judiciary and this plan became the basis of the system finally adopted by the convention.

22. **The compromises of the Constitution.**—The convention without much discussion decided that the legislative department should consist of two houses but on the question of how the states should be represented therein there was much debate, characterized at times by displays of bad feeling on the part of the delegates who insisted on retaining the old principle of equality of representation. The matter was finally compromised by allowing the states equal representation in the upper house and representation in proportion to their population in the lower house. The question of whether the slaves should be counted in determining the basis of representation led to a division among the delegates from the free states and those from the slave states, the latter of whom demanded that the slave population should be reckoned in determining the number of their representatives. This dispute was also finally settled by compromise, it being provided that both representatives and direct taxes should be apportioned among the states in proportion to their population but that only three-fifths of the slaves should be counted for this purpose.

The question of the power of Congress to regulate commerce gave rise to a third controversy which was also settled by compromise. The delegates from the Northern states wished to give Congress the power to regulate commerce by a bare majority but the delegates from the Southern states, which at that time furnished the principal articles of export, feared that the power might be employed to injure their foreign trade and at the same time to prohibit the importation of slave labor. The difference was finally adjusted by the adoption of a provision which gave Congress power to regulate commerce by a majority vote but which also prohibited Congress from restricting the importation of slaves before the year 1808. The settlement of these differences by compromise removed the chief obstacle to the adoption of the Constitution, though it should be remembered that many other less important questions had to be settled also by compromise, so that in reality the Constitution as finally agreed upon was largely an instrument of compromises. However, illogical and objectionable they may be, it is practically certain that without them no agreement would have been possible.

23. **Ratification of the Constitution.**—Before adjourning the convention adopted a resolution providing that the draft of the Constitution should be sent to Congress with the request that this body should transmit it to the legislatures of the several states and that these in turn should submit it to conventions for ratifications. It was also resolved that when it should have been ratified by conventions in nine states it should go into effect between the states so

ratifying. This was undoubtedly contrary to the provisions of the Articles of Confederation, which required the assent of every state to any revision of that instrument; so that in legal theory the Articles were set aside by revolutionary methods, but the impossibility of amendment according to the procedure prescribed by the Articles convinced the convention that only revolutionary processes were practical and hence under the circumstances they were justifiable.

When the Constitution came before the states for ratification it was vigorously attacked in many quarters on the ground that in providing for a national government vested with extensive powers it had sacrificed the rights of the states; that such a government would prove dangerous to the liberties of the people; that the president might easily make himself a dictator; that the senate would become an oligarchy; that the federal judiciary would encroach upon the judicial power of the states; that the Constitution had no bill of rights for the protection of the people in respect to rights of assembly, of speech, of petition, religious worship, etc. The last mentioned objection was only overcome by a promise on the part of the friends of the Constitution that as soon after its ratification as possible amendments would be proposed providing proper safeguards for the security of individual liberty, a promise which was carried out by the adoption of the first ten amendments in 1790.

Partly through the powerful arguments of "The Federalist," written by Hamilton, Jay and Madison, and partly as a result of the prompt and almost unanimous ratification by the small states, from which the opponents of the Constitution had expected their chief support, the opposition broke down and before the end of the year 1788 all the states except Rhode Island and North Carolina had given their adhesion. Rhode Island finally ratified it in November, 1789, and North Carolina did likewise in the following year.

24. **The Constitution in outline.**—A comparison of the Constitution with the Articles of Confederation will reveal its fundamental features. In the first place the Constitution provided for a government whose powers are divided between three separate departments: a legislative, an executive and a judicary, whereas under the Articles of Confederation there was neither executive nor judiciary. Hamilton argued in "The Federalist" that an energetic executive was indispensable to the existence of a good government and that a feeble executive implied a feeble government, which was but another name for a bad government.[32] The lack of an executive to enforce the laws enacted by the Congress of the Confederation proved to be one of its chief weaknesses and the convention was practically unanimous in the opinion that the new government should have an executive vested with large powers. According to Hamilton the crowning defect of the Articles of Confederation was the lack of a national judiciary for, as he observed, laws are a dead letter without courts to expound and define their true meaning and operation.[33] "Where there is no

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[32] The Federalist, No. 69.

[33] Same, No. 22.

judicial department," said Chancellor Kent, "to interpret and execute the law, to decide controversies, and to enforce rights the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty."[34] The new Constitution therefore provided for a national judiciary consisting of a Supreme Court and of such inferior courts as Congress might see fit to create and gave it jurisdiction of all controversies in which the national interests of the country were involved and of controversies affecting the relations of the states with one another.

A weakness of scarcely less importance was the defective organization and imbecility of the Congress of the Confederation. The new Constitution removed these objections by providing for a national legislature constructed on the double-chambered principle and composed of representatives who, although chosen by the states, were to be paid out of the national treasury and whose dependence upon the states was thus minimized rather than emphasized. The principle of legislation by a majority vote took the place of the old rule which required the vote of nine states to pass any really important measure. Finally, the Congress was specifically vested with more adequate powers of legislation, the lack of which had contributed so much to the downfall of the Confederation. First of all, it was given the power of taxation, almost without limit, and what was of equal importance it was vested with the power to regulate commerce with foreign nations and interstate commerce. It was also given the power to coin money, establish post offices, fix the standard of weights and measures, grant patents and copyrights, establish inferior federal courts, punish piracy and offenses against the law of nations, declare war, raise and support armies and a navy, the power to legislate concerning naturalization and bankruptcy and to provide for the government of the territories.

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[34] Commentaries on American Law, § 14.

25. **The Federal Bill of Rights.**—Such in brief outline is the Constitution as originally framed. A grave objection raised against it when it came before the states for ratification was that it contained no bill of rights; that is, no specific guarantees for the protection of individual rights and no guarantee of due process of law in criminal prosecutions.[35] The existing state constitutions, from which many of the ideas and principles of the Federal Constitution had been derived, all had their bills of rights and to these the people attached great importance. Hamilton argued in "The Federalist" that since the national government had only delegated powers, express prohibitions such as a bill of rights presupposed, were entirely superfluous and even dangerous because they would constitute exceptions to power not actually granted and would thus afford a pretext to claim more than was delegated. "For," he contended, "why declare that things shall not be done which there is no power to do? Why, for instance, should it be said

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[35] "To this statement one or two exceptions should be noted. Thus the prohibition on Congress in regard to the suspension of the writ of habeas corpus and against bills of attainder and ex post facto laws were restrictions in the interest of personal liberty."

that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations covering it was intended to be vested in the national government."[36]

He was answered by Madison in the First Congress, who pointed out that although the new government was an authority of delegated powers, it would have even under the narrowest interpretation a wide discretionary power which might be abused, especially since Congress had been given power to pass all laws which it might consider necessary and proper for carrying into execution the powers expressly granted. Largely in obedience to the promises made by its friends before the ratification of the Constitution, Congress in 1789 proposed twelve amendments, ten of which were ratified by the states in the following year. These amendments collectively constitute what has popularly come to be regarded as the Federal Bill of Rights.

In general they prohibit Congress from making any law respecting an established religion or prohibiting the free exercise thereof,[37] or abridging the freedom of speech or press,[38] or the right of the people to assemble peaceably and to petition the government for a redress of grievances;[39] they affirm the right of the people to bear arms; they prohibit the quartering of soldiers in private houses except under certain restrictions; they declare the inviolability of persons, houses and papers against unreasonable searches and seizures; they forbid general search warrants; they secure to accused persons prosecuted in the federal courts the benefits of indictment by a grand jury and speedy and public trial by a jury of the vicinage, together with the other usual guarantees which go to make up due process of law; and they forbid the requirement of excessive bail, the imposition of excessive fines and the infliction of cruel and unusual punishments.[40] The Ninth Amendment declares that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people—a declaration intended to preclude the view which might possibly be put forward that the specific enumeration of certain rights was exhaustive and therefore no others could be claimed. The Tenth Amendment is interpretative in character and declaratory of the meaning of an important principle in the Constitution. It declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." Unlike the other amendments, it was not designed to furnish a guarantee for the safeguard of individual rights, but it is only an interpretative declaration in favor of the principle of the reserved rights of the states.

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[36] The Federalist, No. 84.

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[37] This amendment does not forbid legislation against polygamy and immoral actions practiced under the guise of religious worship. Religion, says the United States Supreme Court, has to do only with the relations between man and an "extramundane being." Reynolds v. the United States, 98 U. S. 145.

[38] This right was really violated by the alien and sedition act of 1798.

[39] Fully discussed by Burgess in his Middle Period, pp. 253-296.

[40] The force and meaning of these guarantees are discussed in Cooley, Principles of Constitutional Law, chaps. 13-15. See Part III for a more detailed discussion of these guarantees.

26. **Sources of the Constitution.**—The Constitution consists of both original and derived features. Mr. Gladstone once spoke of it as the greatest piece of work ever "struck off" at one time by the brain and purpose of man, as if it were wholly or primarily an original creation. Mr. Bryce's statement that there is little absolutely new matter in it, while much of it is as old as Magna Charta, is perhaps more nearly the truth, for even written constitutions are the result to a very large degree of growth and evolution. The embodiment in written form of the principles which they contain is rarely the starting point in the history of a constitution, but is more often a mere episode in its development.

Political institutions are seldom invented; they come into existence through growth, adaptation and combination. The framers of the Federal Constitution were wise enough to recognize this fundamental historical truth and so they avoided the error of the French that a constitution can be conceived and fashioned at once and fitted to a nation as a garment can be cut and fitted to an individual.[41] They did not proceed on the theory that the framing of the Constitution was the beginning of their constitutional development; they were not seduced by the fallacy that a nation may entirely break with the past, set aside all precedents, ignore all past experience and set up a new constitutional structure very much as an architect would clear off a site and construct a new edifice thereon. They preferred to follow as far as possible in old paths and preserve continuity and connection with the past. British and Colonial experience was therefore largely drawn upon and all that was suited to their situation and which had stood the test of time was appropriated. Many of the delegates had helped to frame the state constitutions and all were familiar with their practical working and also with the working of the British constitution. Many of the ideas and the institutions of the state constitutions therefore found their way into the Federal Constitution. Such, for example, were the principle of the executive veto upon legislation, the idea of the Vice Presidency, the executive message, the scheme for the rotation of Senators, the right of each house of Congress to judge of the elections and qualifications of its own members, most of the provisions in regard to the procedure of Congress, the principle that revenue bills shall originate in the lower house, the principle of impeachment, the pardoning power of the executive, the guarantees found in the first ten amendments and many others.[42]

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[41] Compare Boutmy, Constitutional Studies, pp. 167-168.

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[42] See an article by Alexander Johnston in the New Princeton Review for September, 1887, reprinted in Bryce's American Commonwealth, vol. I, appendix, pp. 684-687.

Many features of the English constitution were also drawn upon, as were the great principles of the common law which the colonists had brought with them to America and which had become the basis of their legal system. The Commentaries of Blackstone and the political writings of Locke, Montesquieu and Rousseau likewise had a certain influence upon the political thought of the time. Blackstone's exposition of the English constitution was widely studied in America, Montesquieu's doctrine of the separation of powers was a part of the political creed of the Americans of 1789, and Rousseau's "Social Contract" furnished much of the democratic philosophy which was at the basis of the American system.[43] The fact is, that wherever the framers of the Constitution broke away from the past and created entirely new institutions which did not have the sanction of long usage their efforts were attended with the least success, as the clumsy device for the election of the President bears witness. Perhaps the most purely original work of the convention was the construction of the federal system of government and the delimitation of the spheres of power between the union and the states which compose it.

27. **Amendment and revision of constitutions.**—"Constitutions," said Lord Brougham, "must grow if they are of any value; they have roots, they ripen, they endure."[44] This is no less true of written than of unwritten constitutions, for no constitution ever reaches a fixed form beyond which it ceases to

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[43] Compare Merriam, American Political Theories, chap. 2.

[44] The British Constitution, Works, vol. XI, p. xxi.

develop and expand. Mr. Woodrow Wilson has aptly remarked that a constitution should be not like a contract or will, forever stationary and unchangeable, but a vehicle of life which changes with the changing life of the nation. All constitutions, whether written or unwritten, grow and develop in three ways: by usage, by judicial interpretation and construction, and by the process of formal amendment. Usage plays a more important part in old and well settled societies than in newer ones, where there is less veneration for custom, but even in the newer states of America it plays a no insignificant part, for in fact, they all have their understandings and customs.

The power of the judiciary to interpret the meaning of the constitutional text, and not only this, but the power to discover the meaning which the framers intended to express and what they would have expressed in respect to particular matters had they been gifted with the power of foresight[45] enables it to play a powerful rôle in the development of the constitution. Expansion by interpretation is particularly potent in countries like the United States, where the judiciary interprets not only the statutes but the Constitution itself. It is almost a commonplace therefore to say that much of every constitution which has attained any great age consists of judicial interpretation.

Expansion of the Federal Constitution. The Constitution of the United States has undergone far reaching modification and expansion through the operation of custom. The political constitution, for example, has been largely revolutionized by the customs of the political parties. As a result of these customs the election of the President and the Vice President has been in practice taken out of the hands of the electors; the Speaker of the House of Representatives, from being merely the presiding officer, has become a great party leader, and, at least until recently, he largely controlled the legislation of the house; revenue bills required to be initiated in the lower house may in fact originate in the Senate, through the power of that body to recast bills sent to it from the lower house.

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[45] Compare an article by Professor Munroe Smith, entitled Judge-Made Constitutional Law, in Van Norden's Magazine for 1907, p. 25.

Almost every line of the Federal Constitution has been the subject of judicial construction, its hidden meanings have been brought to light and its provisions made applicable to a great variety of new conditions to which the extraordinary economic, social, political and educational progress of the country has given rise. Stripped of its judicial element much of it would be meaningless and unrecognizable.

The more than two hundred and twenty volumes of the decisions of the federal Supreme Court, not to mention the hundreds of volumes of the decisions of the inferior federal courts, afford evidence of the extensive interpretation to which the Federal Constitution has been subjected. Indeed in all systems of law known to history the courts have worked out an extensive system of jurisprudence known as "judge-made" law. This must necessarily happen in any society which changes and grows. "Human affairs being what they are," says Mr. Bryce, "there must be a loophole for expansion or extension in some part of every scheme of government; and if the constitution is rigid flexibility must be supplied from the minds of the judges."[46]

But the most prolific source of constitutional expansion is, of course, formal amendment in pursuance of the method of procedure set forth in the Constitution itself. The methods and procedure of amendment may now be described.

28. **The procedure for amending the Federal Constitution.**—The Federal Constitution, unlike most of the original state constitutions, contains a provision describing the mode of procedure by which it may be amended. According to this procedure there are two stages, the framing of the proposed amendment and the ratification.

Amendments may be proposed by either of two methods: First, they may be proposed by a resolution of the two houses of Congress, a two-thirds majority of both houses concurring;[47] second, they may be proposed by a convention which Congress shall call on application of the legislatures of two-thirds of the states. They may be ratified also in two ways: first, by the legislatures of three-fourths of the states; second, by conventions in three-fourths of the states, as one or the other mode may be designated by Congress.[48] Thus far, only the first mode of proposing amendments and only the first mode of ratification has been employed in all the cases in which amendments have been made.

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[46] Studies in History and Jurisprudence, vol. I, p. 197.

[47] The view seems to be established that the veto power of the President does not extend to resolutions proposing amendments to the Constitution. Hollingsworth v. Virginia, 3 Dall. 378 (U. S.), and Jameson, Constitutional Conventions, § 556.

The extraordinarily large number of states required to ratify has made the employment of the amending power very difficult and it has given the Federal Constitution the character of a rigid rather than of a flexible instrument. The English writer, Dicey, once compared the federal amending power to a slumbering monarch who can only be aroused by the thunders of revolution[49] and its excessive inelasticity has been strongly criticised by some American commentators. Burgess, for example, says, "When I reflect that our national conditions and relation have been requiring a gradual strengthening and extension of the powers of the central government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of civil war, I am bound to conclude that the organization of the sovereign power within the Constitution has failed to accomplish the purpose for which it was constructed."[50] More than two thousand amendments have been suggested since the adoption of the Constitution, but aside from the seventeen that have become a part of the Constitution, only three have secured the requisite two-thirds majority of the two houses of Congress.[51] The circumstances under which the first ten amendments were adopted make them for all practical purposes a part of the original instrument.

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[48] The question whether a state which has once given its ratification may withdraw it, was raised by the action of Ohio and New Jersey in respect to the Fourteenth Amendment. The general opinion now is that no such withdrawal is allowable. See Cooley, Principles of Constitutional Law, p. 222, and Jameson, Constitutional Conventions, § 576.

[49] Law of the Constitution (2d ed.), p. 137.

[50] Political Science and Constitutional Law, vol. I, p. 137.

The Eleventh Amendment was added in 1798 in consequence of the popular dissatisfaction at the decision of the United States Supreme Court in the case of Chisholm v. Georgia,[52] holding that a state could be sued in the federal courts by a private citizen. The amendment provides that the judicial power of the United States shall not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. Adopted out of deference to the pride of the states which were then over-sensitive in respect to matters affecting their sovereignty, the amendment has had one rather lamentable result, namely, to exempt from the federal jurisdiction a state which has repudiated a debt, leaving to the foreign bondholder no recourse except in courts of the debtor state.

The Twelfth Amendment was an outgrowth of the crisis occasioned by the Presidential election of 1801 and was designed to prevent similar deadlocks in the future, by requiring the electors in preparing their ballots to designate the names of the persons for whom they were voting for President and for Vice President, respectively. No additional changes were made until after the Civil War when the Thirteenth, Fourteenth and Fifteenth Amendments were adopted in 1865, 1868 and 1870, respectively. They embody the great constitutional results of the war, and as the first ten amendments were prohibitions on the federal government, the latter are mainly limitations on the powers of the states, though the provisions of the Thirteenth and Fifteenth apply equally to the federal government. The Thirteenth prohibits slavery and involuntary servitude; the Fourteenth extends the privileges of citizenship to the negro race and forbids the states from abridging the privileges or immunities of citizens of the United States or of depriving any person of life, liberty or property without due process of law or of denying to any person within their jurisdiction the equal protection of the laws; the Fifteenth affirms that the rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.[53]

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[51] Compare J. Allen Smith, The Spirit of American Government, p. 46.

[52] 2 Dall. 419 (U. S.).

The Sixteenth Amendment proposed in 1909 and ratified in 1913, gives Congress power to levy taxes on incomes without being under the necessity of apportioning the same among the states on the basis of their populations, the Supreme Court having held that such taxes were "direct" in the sense of the Constitution and to be valid must be levied according to the principle of apportionment.[54] An amendment (the Seventeenth) providing for the popular election of United States Senators has recently been ratified by the requisite number of states and is now a part of the Constitution.

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[53] See Citizenship, Due Process of Law, Suffrage, Part III.

[54] Pollock v. Farmers' Loan and Trust Company, 158 U. S. 601.

While only seventeen formal amendments have been made to the Constitution, it should be remarked that, if we ignore the intrinsic difference between constitutional provisions and many statutes of an organic character, which is in fact often slight, the meager outlines of the Constitution have been filled up and the details supplied by a long series of important statutes, which, while not modifying it, have completed it and made it a workable instrument. Such, for example, are the important acts of 1866 in regard to the election of United States Senators by the legislatures, of 1886 in regard to the Presidential succession, and of 1887 relative to the modes of counting the electoral vote and of determining disputes arising in connection therewith.

29. **Amendment of state constitutions.**—The right of the people to alter, amend or abolish their form of government, whenever they shall deem it necessary to their safety and happiness, is solemnly asserted in the bill of rights of every American state constitution. Nevertheless nine of the twenty-five constitutions adopted by the states before the beginning of the nineteenth century contained no express provision for their own amendment.[55] Two general methods of amending the state constitutions have long been in force and to these should now be added a third, recently provided for in a few Western states where the principle of the initiative and referendum has been most completely worked out. The first method is that of amendment through the agency of

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[55] See Garner, Amendment of State Constitutions, in the American Political Science Review, vol. I, pp. 213 and following.

a convention; the second, is that through legislative initiative, followed by a referendum; the third is that through popular initiative followed by the referendum. Of the original constitutions none made provisions for amendment by more than one mode of procedure, whereas at the present time at least two-thirds of all the constitutions provide for a double method of amendment. The second method, that of legislative initiative followed by a popular vote is now provided in all the constitutions except that of New Hampshire, where amendments can only be made by a convention. In all the states except Delaware, constitutional amendments proposed by the legislature must be submitted to popular vote. In that state adoption of the proposed amendment by two successive legislatures, two-thirds of both houses concurring, is all that is required.

30. **Procedure and limitations.**—The three methods by which conventions may be called have already been described under the section entitled "Framing of constitutions." In practically all the states in which the legislature may propose amendments, the proposal may originate in either house. The size of the vote required ranges from a bare majority of both houses to a two-thirds majority. In the vast majority of the states the yeas and nays must be entered on the journal of each house; in most of them the amendment is required to be published in some form and in a few of the more recent constitutions provision is made for supplying the voters with special information in pamphlet form regarding proposed amendments. In some states amendments proposed

by one legislature must be passed by the succeeding legislature before being submitted to a popular vote; in nearly half of them proposed amendments must be submitted in such a way as to enable the voters to vote separately on each amendment where more than one is submitted, while New Jersey requires submission at a special election. In a number of states there are limitations on the number of amendments that may be proposed at the same session and some constitutions forbid the proposing of amendments oftener than once in a given period of years. The size of the popular vote necessary to ratify is usually a bare majority of those voting on the proposition to amend although in a few states a majority of those voting at the election at which the amendment is submitted is required and in three states it is a "majority of the electors" of the state. Where a majority of those voting at the election is required, amendment is very difficult for the reason that many persons who cast votes for candidates do not vote on proposed amendments.[56] Likewise the requirement of a majority of the electors of the state makes it equally difficult because not infrequently a large percentage of the voters do not go to the polls at all.[57]

The constitution of Oregon (1902) contains a provision whereby proposed amendments may be initiated by popular vote and voted on by the electors without the intervention of the legislature in any form, and a number of amendments have in fact been proposed and ratified in this manner. It represents the most advanced method of amendment yet devised. The recent constitutions of Oklahoma, Michigan and Missouri contain somewhat similar provisions.

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[56] From 1899 to 1908 the average vote on proposed amendments was less than fifty per cent of that upon candidates.

[57] For actual examples, see citation, note 55; also Dodd, The Revision and Amendment of State Constitutions, pp. 18 and following.

31. **Judicial interpretation of the amending power.**—A number of legal questions have arisen in connection with the procedure of amendment and have been the subject of judicial interpretation. One of the earliest and most important was whether when the constitution expressly provides one mode of procedure, another and different mode may be followed. When such a case arose in Massachusetts in 1833 the Supreme Court gave an advisory opinion in the negative,[58] and the Supreme Court of Rhode Island gave a similar opinion on a like question in 1883.[59] The settled rule is that the prescribing of one rule excludes any other, though this doctrine is not strictly adhered to in regard to mere matters of procedure. Usually the judicial construction of the amending provision has been liberal and doubts are generally resolved in favor of amendments that have been ratified by the people.[60] The proper rule seems to have been stated by the Supreme Court of Colorado when it said: "At the outset it should be stated that every reasonable presumption, both of law and of fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people."[61]

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[58] Opinion of the Justices, 6 Cush. 573 (Mass.).

[59] Same, 14 R. I. 649.

[60] See the cases cited in Dodd, The Revision and Amendment of State Constitutions, note, p. 172.

[61] People v. Sours, 31 Colo. 369.

But some courts have preferred to follow the rule of strict construction.[62] The courts everywhere, however, have considered the constitutional requirements to be mandatory and not merely directory, and if a required step is omitted or not complied with in substance the rule of strict construction will not be varied from. Thus where the constitution required that proposed amendments should be passed by two successive legislatures, and a number having been so passed, but one of them being omitted by inadvertence during its passage through the second legislature, it was held that the omitted amendment had not been constitutionally ratified.[63] The same rule was adopted in Iowa where an amendment having passed one legislature was materially altered by the second legislature.[64] Compliance with provisions in regard to "entries" on the journals of votes on proposed amendments is generally insisted upon, although there is a disposition not to inquire too strictly into technical and immaterial errors when the constitution has been ratified by popular vote.

The provision that proposed amendments shall be passed by a two-thirds majority of each house has been interpreted to mean two-thirds of a quorum,[65] and it has been held that since amendments are not laws they need not be submitted to the executive for his approval.[66] The requirement that amendments shall be submitted so as to allow the voters to vote on them separately, where more than one is submitted, has been interpreted as having reference to amendments which have different objects and purposes, which relate to more than one subject and which are independent one of the others.[67]

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[62] For example, the Supreme Court of Iowa in Koehler v. Hill, 6 Iowa 543, and that of Mississippi in State v. Powell, 77 Miss. 543.

[63] Collier v. Frierson, 24 Ala. 100.

[64] Koehler v. Hill, 60 Iowa 543.

[65] Green v. Weller, 32 Miss. 650, and State v. McBride, 4 Mo. 303.

[66] State v. Mason, 43 La. Ann. 590.

32. **Number of amendments adopted.**—In many states one hears frequent complaint concerning the excessive rigidity of the constitutions. In states like Illinois, Indiana and Mississippi, where amendments require a majority of the electors voting at the election to ratify, constitutional changes are very difficult, in fact almost impossible. Likewise in New Hampshire, where the only mode of amendment is by convention, and in Rhode Island, where the only mode is that by legislative process and where the majority of the popular vote necessary to ratify is three-fifths, the amending process has failed to work. In the majority of states, however, even where the restrictions are drastic, there is a regular biennial flood of amendments. During the decade from 1894 to 1904 eight states adopted new constitutions, two others had revised constitutions rejected and three others voted for conventions to prepare revisions. During the same period, 412 amendments were formally proposed by the legislatures. Of these, 230 were adopted and became parts of the existing constitutions, while 182 were rejected by the voters or were not repassed by the legislature. New York, with a comparatively new constitution, proposed six; California, thirty-eight,

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[67] State ex rel. Hudd v. Timme, 54 Wis. 318, and the more recent case of Chicago v. Reeves, 220 Ill. 274. For a contrary opinion on a similar question, see State v. Powell, 77 Miss. 543.

of which twenty were adopted; Louisiana, twenty-two, of which fifteen were adopted; Missouri, twenty-one, of which fifteen were adopted; Florida, twenty-one, of which thirteen were adopted; Colorado, twelve, Michigan, sixteen; Oregon, eleven; Texas, twelve; New Hampshire, ten; and Nebraska, ten.

33. **Rules for the construction of state constitutions.**—No constitution is perfectly drawn and even if such an ideal were possible of attainment the deficiencies of language, the ambiguities of expression and the rise of new circumstances to which it must be applied make frequent judicial construction an absolute necessity. In the course of time the courts have developed certain generally observed rules according to which they construe the meaning of state constitutions, the more important of which are here briefly stated. The courts will not attempt to control the discretionary authority vested by the constitution in the other departments or officers of the government. Thus if the constitution authorizes the governor to summon in his discretion the legislature in extraordinary session or to call out the militia on certain occasions, the courts cannot intervene to compel or restrain his action if the proper occasion exists.

In most cases the conclusiveness of a judicial determination is final and absolute and the controversy cannot be renewed again by the parties. When a court has deliberately reached a decision it ought never to be disturbed by the same court except for very urgent reasons and upon clear evidence of error. This is known as the doctrine of *stare decisis,* according to which the judges of the same jurisdiction are expected to follow in the future the decisions which they have once rendered. Without the observance of this rule the law would be in a state of uncertainty, and great inconvenience, not to say injustice, would result to private individuals who are accustomed to rely upon the precedents set by the courts in their decisions. An inflexible rule is that construction must be uniform; a constitution is not to be made to mean one thing to-day and something else to-morrow, even if the circumstances have so changed as to make a different rule seem desirable. If changes in the constitution are needed, it is for the people to make them through the processes prescribed for adopting constitutional amendments; it is not the proper function of the courts. In construing a written constitution the highest aim of the courts should be to give effect to the manifest intent of the people who framed it, and this intent ought to be found in the text of the instrument itself. To this end the whole instrument should be examined with a view to arriving at the meaning of each part. The meaning of an obscure or intricate clause may sometimes be cleared up by comparing it with other provisions. If different portions seem to be in conflict, the courts should, if possible, harmonize them, and they ought to incline toward a construction which will render every word operative.

A reasonable rule of construction is that the constitution shall be examined in the light of and with the assistance of the common law, particularly in respect to the meaning of words and phrases of common-law origin. A commonly observed rule is that statutes in derogation of the common law shall be strictly construed but this rule can seldom be applied with propriety or safety in the construction of constitutions. Unless the provisions of the constitution expressly and plainly show the contrary intent, a constitution should operate prospectively only, for retrospective laws, except when they are of a remedial or a curative character, are generally regarded with objection. When a particular construction has been acquiesced in for a considerable time and has been generally regarded as correct, and especially if it has been contemporaneous with the adoption of the constitution, considerations of public policy and even of justice, as where rights have accrued in reliance upon it, require that it should not be disturbed except for very weighty reasons. The well recognized distinction between mandatory and directory provisions of statutes cannot be given the same weight in the interpretation of constitutions. Constitutions rarely contain provisions of a mere directory character. Where they give directions respecting the manner in which a power shall be exercised there is a strong presumption that it was intended to be done in the mode prescribed. There are, however, instances in which the courts have applied the distinction between mandatory and directory provisions to the construction of constitutions, but the weight of authority is overwhelmingly against such a rule.[68]

34. **Supremacy of the Federal Constitution.**—Ar-

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[68] This summary of the rules of construction is based mainly on Cooley, Constitutional Limitations, chap. 4.

ticle VI, § 2, of the Federal Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding." It follows from this provision, therefore, that any state constitution or act of the legislature which is inconsistent with any provision of the Federal Constitution, or of any act of Congress made in pursuance of the Constitution, or of any treaty made under the authority of the United States, is of no force and validity, and it is not only the right but the duty of all judges, whether state or federal, to refuse to be bound by such state constitution or legislative act. The judges are especially bound by oath to support the Federal Constitution since it is their peculiar function to construe and declare the law and consequently to give effect to it by their orders and judgments.

In every case, therefore, where a state judge finds a state law, whether it is a part of the state constitution or only a statute, in conflict with a national law he must disregard the state law and give effect to the national law. The above provision is plain and emphatic and has the effect of making the Federal Constitution, laws and treaties paramount. This must necessarily be the case under a federal system of government; otherwise the maintenance of the supremacy of the national government in its sphere would be impossible. Likewise an act of Congress or a treaty which stands in conflict with a provision of the Federal Constitution can have no validity and is obligatory upon no one.[69]

As between a treaty and an act of Congress the rule is that the one last enacted or concluded must stand, for neither has any higher legal authority than the other. A treaty, therefore, may supersede a prior act of Congress, and on the other hand an act of Congress may supersede a prior treaty.[70]

35. **Power of the courts to declare statutes unconstitutional.**—Concerning the right of the judiciary to disregard the provisions of a state statute or even of a state constitution which is repugnant to the provisions of the Federal Constitution, laws or treaties, there could never have been much doubt, because the right and duty are plainly imposed upon both federal and state judges by the terms of Article VI of the Federal Constitution quoted in the preceding section. As has been said, the right of the judges to refuse to be bound by state laws which are inconsistent with the Federal Constitution and laws resulted from the very nature of the union and the declared supremacy of its Constitution. But did it result therefrom that the judiciary had also the power to set aside the acts of the legislative department when it was a coördinate branch of the government? That is to say, might the federal judiciary overrule an act of Congress and the state judiciary an act of the leg-

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[69] United States v. Cruikshanks, 92 U. S. 542; United States v. Harris, 106 U. S. 629; Civil Rights Case, 109 U. S. 3.

[70] Foster v. Neilson, 2 Pet. 253 (U. S.).

islature whenever the former was evidently inconsistent with the Federal Constitution and the latter inconsistent with the state constitution? Outside the United States the practice, and for the most part the opinions of jurists, have been adverse to such a claim on the part of the courts. Practically everywhere on the continent of Europe it is a general principle of public law that the legislature is the sole judge of the validity of its own acts.[71]

In Germany the Imperial Court exercises the right to nullify the legislative acts of the states when they are in conflict with the Imperial constitution,[72] but it has never assumed to declare null and void an imperial statute because of its inconsistency with the Imperial constitution.[73] So in France and in other countries of continental Europe the courts must enforce the declared will of the legislature whether it is consistent with the constitution or not. In England, where the sovereignty of Parliament is the fundamental principle of the constitution and where provisions of the constitution have no higher legal authority than ordinary laws, the courts have no power to judge of the validity of an act of Parliament. In spite of the early opinion of Coke, who asserted that an act of Parliament "against common right and reason could be adjudged void at common law,"[74] the English courts have always regarded acts of Parliament binding even when they were contrary to the principles of the common law and the ancient customs of the realm. Acts of Parliament are sometimes said to be "unconstitutional" but the term as used in England has a very different significance from what it has in the United States. In the United States an "unconstitutional" statute is one which is repugnant to some higher positive law and it is therefore a nullity because it is illegal; in England a statute is sometimes said to be "unconstitutional," not because it is contrary to some higher positive law, but because it is opposed to the spirit of ancient custom or immemorial practice. But it is not for that reason void; on the contrary, however immoral or unjust it may seem, it is the law of the land and as such it is binding upon the courts. In the British self-governing colonies, however, where the federal system of government has been introduced the right of the courts to overrule the acts of the local legislatures when they are inconsistent with the provisions of the federal constitutions or statutes is clearly recognized and exercised,[75] but they do not presume to pass upon the validity of the acts of the legislature when it is a coördinate body; it is only the acts of subordinate law-making bodies that they have the power to overrule.

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[71] Compare Esmein, Droit Constitutionnel, p. 431.

[72] Laband, Staatsrecht des Deutschen Reichs, vol. II, p. 576.

[73] Garner, The German Judiciary, in the Political Science Quarterly, vol. XVIII, pp. 524-530.

[74] 8 Coke 114 (Eng.); compare also Dicey, § 2.

36. **Early American practice.**—As has been said, the right of the courts to set aside the acts of the state legislatures which were repugnant to the Federal Constitution, laws and treaties was generally recognized as resulting from the declared supremacy of

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[75] Munro, The Constitution of Canada, pp. 5, 219; Moore, The Commonwealth of Australia, pp. 173-177.

the Union. In addition, the very different principle was asserted that the courts of the states were the judges of the constitutionality of the acts of their own legislatures, that is, they asserted the right to do what virtually amounted to the placing of their own interpretation of the powers of the legislature over that of the legislature itself, although a body equal and coördinate in authority with the judiciary.

As early as 1780 the Supreme Court of New Jersey in the case of Holmes v. Walton[76] affirmed the right of the judiciary to disregard acts of the legislature which were forbidden by the Constitution. In 1784 this case was followed by a decision in New York in the case of Rutgers v. Waddington, in which essentially the same principle was asserted;[77] and in 1786 by a decision of the highest court of Rhode Island in the case of Trevett v. Weeden.[78] The legislature of New York passed a resolution denying the right of the courts to disregard its acts, and in Rhode Island an attempt was made to get rid of the judges who made the decision in Trevett v. Weeden. As a matter of fact, the latter judges were not reëlected but were supplanted with "pliant tools" by whose assistance paper money was forced into circulation and public and private debts extinguished by it. Neither the federal nor state constitutions expressly conferred upon the judiciary the power to pass upon the constitutionality of statutes though it seems to have been understood by the statesmen of the time as being an

[76] The American Historical Review, vol. IV, p. 456.

[77] Fiske, Critical Period of American History, p. 127.

[78] Coxe, Judicial Power and Unconstitutional Legislation, pp. 234 and following.

inherent part of the judicial power and therefore it did not need to be expressly granted. As Dicey observes, it is now considered not only the right but the duty of every judge in the United States to treat as void any enactment which violates the Constitution,[79] and Judge Cooley adds that it is now generally agreed that the courts cannot properly decline to overrule the acts of the legislature when it has exceeded the authority set by the Constitution to its limits.[80]

The right was asserted by many framers of the Federal Constitution,[81] and notably by Hamilton, whose argument was powerful and logical. He declared: "There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor or commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this, would be to affirm that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that mere men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."[82] The Constitution, he said, could not have been presumed to make the legislature the judge of its own powers. "A constitution is in fact and must be regarded," Hamilton went on to say, "as a fundamental law." It therefore belongs to the judiciary to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be a variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute; the intention of the people to the intention of their agents. "Nor does this doctrine by any means," he said, "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than by the former. They ought to regulate their decisions by the fundamental laws, rather than by those that are not fundamental."[83] The claim seems to have first been put forward by a federal judge in 1795, when Mr. Justice Patterson of the United States Supreme Court, in charging a jury,[84] said: "I take it to be a clear position that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that in such a case it will be the duty of the court to adhere to the Constitution and to declare the act null and void."

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[79] Law of the Constitution (2d ed.), p. 125.

[80] Constitutional Limitations, p. 228.

[81] This has been shown recently by Professor Beard in his book, The Supreme Court and the Constitution (New York, 1912).

[82] The Federalist (Dawson's ed.), No. 78.

The idea that statutory law in order to be valid must conform to the Constitution and that the judiciary is the judge of such conformity originated, therefore, in the United States and is peculiar to American jurisprudence. It may also be added that it is likewise a well settled rule that the acts of the executive must conform equally to the Constitution, and the courts are the judges of the validity of his acts and may declare them unconstitutional the same as they may declare acts of the legislature unconstitutional. Manifestly, this does not mean that the executive cannot interpret the Constitution; in many cases executive interpretation is necessary before execution of the laws is possible, but executive interpretation is not final; the power of final interpretation rests ultimately with the judiciary. President Jackson's claim that the executive had equally with the judiciary the right of final and authoritative interpretation is not recognized and has not been acted on in practice.

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[83] The Federalist (Dawson's ed.), p. 542.

[84] In the case of Vanhorne's Lessee v. Dorrance, 2 Dall. 304 (U. S.).

37. **The doctrine of Marbury v. Madison.**—The Supreme Court of the United States asserted for the first time the right to declare an act of Congress unconstitutional in the case of Marbury v. Madison, in 1803.[85] Congress had passed an act to give the Supreme Court original jurisdiction in a case not authorized by the Constitution, which especially enumerates the matters in which that court shall have original jurisdiction. The law was clearly in violation of the Constitution, and the Supreme Court ruled that for this reason it was not binding, that is, it was null and void. Chief Justice Marshall, who gave the opinion of the court, held that the limitations imposed by the Constitution upon the legislative power

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[85] 1 Cranch 137, LEADING ILLUSTRATIVE CASES.

would be meaningless if the legislature itself were left to judge of the nature and extent of these limitations. Summing up the whole argument, he said: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution,—if both the law and the Constitution apply to a particular case, so that the courts must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law,—the courts must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

The rule laid down in this celebrated case was afterwards affirmed and acted upon uniformly both by the federal and state courts in many cases, though for a time there were protests against it and in some cases state judges who assumed the power to set aside the acts of the legislature were removed from office by impeachment proceedings or by legislative acts abolishing the courts of which they were members.[86] Thirty-four acts of Congress have been declared unconstitutional by the Supreme Court, the best known being the Missouri Compromise of 1820, the Legal Tender Act of 1866, the so-called Ku Klux Act of 1870, the Civil Rights Act of 1875, the Trade-Mark Act of 1876 and the Income Tax Law of 1894.[87] Likewise over two hundred state statutes have been nullified by the Federal Supreme Court and of course thousands have been overruled by the state courts.

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[86] See Baldwin, The American Judiciary, pp. 108-118, and Cooley, Constitutional Limitations, pp. 229-230.

Finally it may be remarked that in the exercise of its power to review legislation the courts are sometimes called upon not merely to determine the meaning of a statute but to pass upon the correctness of certain findings of facts. Thus where a state legislature has prescribed the maximum rate which a railroad company may charge it may become necessary for the courts to determine whether the rate prescribed is so low as to be virtually confiscatory and therefore amounts to the taking of private property without due process of law. In such a case there is no question of constitutional interpretation but merely the determination of the fact as to whether the rate is or is not confiscatory in effect.

38. **Reasons for the doctrine.**—It is sometimes argued that such a power in effect places the judiciary in a position of superiority over the legislature, which was intended to be a coördinate branch of the government and with coequal authority; and that it virtually gives the judges a veto power over the acts of the legislature and thereby enables them to control

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[87] See Baldwin, The American Judiciary, p. 106, where the cases are cited, and Moore, The Supreme Court and Unconstitutional Legislation (New York, 1913), p. 129.

legislation. But the courts have always denied that such was the effect of the rule. In a given case they are called upon to give effect to a law and at the same time they are bound by oath to regard the Constitution. If the law is clearly in conflict with the Constitution they merely give effect to the Constitution, as the higher law, disregarding the unconstitutional act, which is not law at all. "The courts," said the late Judge Cooley, "sit not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within the constitutional limits that they are at liberty to disregard its action; and in doing so they only do what every private citizen may do in respect to the mandates when the judges assume to act and to render judgment or decrees without jurisdiction. In exercising this high authority the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."[88]

The true reason why the right of the courts to declare unconstitutional acts of the legislature to be null and void has found a place in our jurisprudence is political in character. Under our system of constitutional limitations it is necessary that the power to enforce these limitations should be lodged somewhere, else they must be ineffective. To vest the power in the legislature would be to make it the judge of its own powers and hence so far as it is concerned the restrictions imposed upon it would in effect be nothing but self-limitations. To the judges, therefore, as the protectors of private rights and as the magistrates best fitted by training and temperament to exercise so delicate a function, the power is by common consent acknowledged to rightfully belong. The effect is to give to the judiciary an importance and a responsibility which it enjoys in no other country. De Tocqueville, speaking of the value of the rule, said it formed one of the most powerful barriers ever devised against the tyranny of political assemblies,[89] and the English writer Dicey has remarked that it "makes the judges the guardians of the constitution and provides the only safeguard which has hitherto been invented against unconstitutional legislation."[90]

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[88] Constitutional Limitations, p. 228.

39. **Conditions under which a statute will be declared unconstitutional.**—The act of declaring a statute null and void is a peculiarly delicate one, involving as it does the overruling by the judiciary of a decision of a coördinate department of government and which presupposes that the legislature has either deliberately, or for want of knowledge, disregarded the limitations set to its authority by the constitution. It is to be presumed, therefore, that the

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[89] Democracy in America, vol. I, chap. 6.

[90] Law of the Constitution, p. 125. For further discussion on this point see Story, Commentaries, § 373 and following; I Kent Commentaries, 449 and following; Rawle, On the Constitution, chap. 21; Willoughby, Constitutional Law, § 6; and the very learned essay of the late Professor Thayer on The Origin and History of the Right of the Courts to Declare Acts of the Legislature Unconstitutional, in his Legal Essays (1908).

courts will exercise such a power with caution and reluctance, only after careful deliberation, and then only when it becomes an imperative duty. Certain rules have been developed which the courts uniformly observe in performing this duty.

In the first place, since the duty is strictly judicial in character it will only be exercised when a case involving the question of unconstitutionality has come before them in the regular course of procedure. It may happen, therefore, and has happened, that an unconstitutional statute will be enforced as a valid law before some interested party raises the question in the proper form. In the second place, whenever there is a reasonable doubt as to the unconstitutionality of a statute the doubt will be resolved in favor of its validity. The courts will presume that the legislature did not intend to violate the constitution; a "decent respect" to the wisdom, integrity and patriotism of a coördinate department of the government requires that its acts shall not be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. The United States Supreme Court has said that "every possible presumption is in favor of the validity of the statute and this continues until the contrary is shown beyond all reasonable doubt. * * * The safety of our institutions depends in no small degree on a strict observation of this salutary rule."[91] In the third place, most courts refuse to pass upon questions of unconstitutionality except when there is a full bench of judges present. In the fourth place, the courts will not express an adverse opinion on the validity of a statute unless it is absolutely necessary to the determination of the issue involved, but will, if possible, rest its judgment upon some other ground and thereby render the constitutional question immaterial. Fifth, the courts will not listen to an argument against the constitutionality of a statute by a party whose rights are not directly involved and who therefore has no interest in having it set aside. Sixth, they will not overrule a statute merely because it is unjust or oppressive or violates the supposed natural rights of the citizen or some fundamental principle of republican government or the spirit of the constitution. The Supreme Court of New York has said "that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because * * * it is not justified by public necessity or designed to promote the public welfare. If it violates no constitutional provision it is valid and must be obeyed. * * * The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinion upon a point of right, reason, and expediency with the law-making power."[92] To invalidate an act of the legislature on any of these grounds it must be shown that the rights in question are guaranteed by the constitution and placed beyond legislative encroachment.

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[91] Sinking Fund Cases, 99 U. S. 700.

A statute may be unconstitutional in part and entirely unobjectionable in other particulars, especially in those states where there are no prohibitions on the power of the legislature to deal with several unrelated subjects in the same bill. In such cases the unobjectionable portions will be sustained if they can stand alone unaffected and unimpaired by the parts which have been overruled. Finally, courts of first resort ought not to hold an act unconstitutional, except in cases where it is clearly inconsistent with the constitution, but should leave it to the final judgment of the higher courts.[93]

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[92] Bertholf v. O'Reilly, 74 N. Y. 509.

40. **Extrinsic evidence.**—In construing the constitution the courts will first of all endeavor to ascertain its meaning by a resort to the language of the text itself. But owing to the difficulties and ambiguities of language and the all too frequent carelessness of parliamentary draftsmen, its meaning is often uncertain. Under such circumstances the courts are accustomed to have resort to certain extrinsic aids in their efforts to discover the true intent of the authors. They study the history of the events which led up to the adoption of the constitution, the objects which were sought to be accomplished and the evils, if any, which it was desired to abolish. In this connection, of particular importance are the proceedings of the conventions which framed the constitution, and in the case of the Federal Constitution, the proceedings of the ratifying conventions of the states, the public utterances of the men who aided in framing it or who otherwise played an important part in securing the establishment of the Constitution. If the proceedings of the convention clearly indicate the

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[93] For good statements of these rules see Cooley, Constitutional Limitations, pp. 230-260, and Willoughby, Constitutional Law, §§ 7-10.

purpose of a particular provision great weight may properly be attached to them. The same may be said of the debates, which clearly show the meaning that was intended to be given a clause which appears ambiguous to the judges. "The history of the calling of a convention," says Judge Cooley, "of the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the convention."[94]

For the interpretation of the Federal Constitution, "The Federalist" has been a valuable source of extrinsic evidence, not only because its essays are the most profound contemporary commentaries on the Constitution in existence but because two of its authors, Hamilton and Madison, were leading members of the convention which framed the Constitution. The debates in the legislature may also be consulted to ascertain the intent of the legislature when there is doubt as to what was intended to be accomplished by a particular piece of legislation. Finally, the preamble of the Constitution may be resorted to in cases of ambiguity where the intention of the framers of the Constitution does not clearly appear, though of course it cannot be relied upon to give the body of the instrument a meaning other than that which its language plainly imports.[95]

41. **Effect of void statutes.**—In general it may be said that when a statute has been declared uncon-

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[94] Constitutional Limitations, p. 101.

[95] Willoughby, Constitutional Law, p. 39, and Story, Commentaries, § 462.

stitutional, the effect is as if the statute had never been passed. But the statute has not been repealed by the courts; it remains on the statute books as an act of the legislature, though the decision of the court is that it has never been a valid statute. The decision is merely conclusive as to the rights of the parties and serves as a precedent which will have great weight in the determination of subsequent cases involving similar questions.[96] While other departments of the government are likely to accept the conclusions of the court as to its validity, there is no way of compelling them to do so; nevertheless the knowledge that if another case is presented to the court involving the same question it will adhere to its former decision is almost certain to insure its observance by the other departments. "Rights," says Judge Cooley, "cannot be built up under a void statute; contracts which depend on it for their consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made."[97] It may in certain cases afford protection to an officer from prosecution for an act which owing to his reliance upon the statute could not have been criminal in intent. He could not, for example, be held for larceny or trespass for confiscating property which he thought himself authorized to destroy under a statute which he had no means of knowing to be unconstitutional. However, he would be liable civilly to the injured party in such a case just as though the act had never been passed. On the other hand, an officer who should decline to obey a statute which he honestly believed to be unconstitutional would be liable in case the law should be subsequently upheld by the courts.[98]

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[96] McClain, Constitutional Law in the United States, p. 23.

[97] Constitutional Limitations, p. 259.

42. **Advisory opinions.**—Although, as has been said, the courts will not determine upon the constitutionality of a statute except when a case involving the question has been brought before them in the regular course of procedure by a party or parties whose interests are directly involved, a few state constitutions provide that the judges of the Supreme Court shall, upon the request of the legislature, render an opinion upon the constitutionality of a proposed law whenever it shall be submitted to them. Such provisions are contained in the constitutions of Maine, New Hampshire, Massachusetts and Rhode Island. In Colorado, Florida, Idaho, Illinois, Nebraska and Washington the judges are empowered to suggest improvements in the laws for the information of the legislature. The purpose of an advisory opinion is that the legislature may abstain from enacting a law which the Supreme Court believes to be unconstitutional. But such opinions are not necessarily conclusive; they are usually rendered without the benefit of argument at the bar and the court is less likely to go thoroughly into all the phases of the question. Consequently, where an adverse opinion is given in such cases and the act is passed, notwithstanding the opinion of the court, and its validity subsequently contested the court may upon full hearing and in the

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[98] Hall, Constitutional Law, p. 47.

light of information afforded by the arguments at the bar reverse its opinion and sustain the validity of the law.

In some states whose constitutions contain no provision in regard to advisory opinions, the courts have nevertheless been called upon by the legislature or the executive for opinions regarding the constitutionality of acts; in some cases the opinions have been given, but more generally refused. President Washington called on the Supreme Court of the United States for an opinion regarding the meaning of certain provisions in the treaty of 1778, with France, but it declined to respond, very wisely, says Thayer; otherwise the court might have established a precedent which would have brought it into politics.[99]

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[99] On the question of advisory opinions, see 1 Thayer, Cases on Constitutional Law, § 175; Cooley, Constitutional Limitations, pp. 72-73; Willoughby, Constitutional Law, pp. 13-14.

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CONSTITUTIONAL LAW

PART II

ORGANIZATION AND POWERS OF THE UNITED STATES GOVERNMENT

BY

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CHAPTER I.

RELATIONS BETWEEN THE UNION AND THE STATES.

1. **Federal government.**—The governmental system of the United States is federal in organization; that is, it is a dual system under a common sovereignty. First of all, it may be contradistinguished from a unitary or centralized system, in which the powers of government are concentrated in a single supreme organ or organs located at a common center and from which the local organizations derive their existence and powers. Under the latter system the local governments are merely the creations of the central government and are completely subject to its control. They are, therefore, nothing but agencies of the central government and have no local auton-

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omy of their own. Such are the governments of England, France, Spain and those of continental Europe generally. Federal government may also be contradistinguished from confederate government or that form in which the local organizations are sovereign, or nearly so, the central government being merely the creature and agent of the local governments. Wheras under the federal system there is but one sovereignty, under the confederate system there are as many sovereignties as there are states composing the confederation. The government of the United States from 1781 to 1789 was a good example of such a system. It is a transitory form of political organization and usually develops into the federal system or dissolves into its constituent elements.

The characteristic feature of federal government is that it is dual in organization and implies local self-government in respect to matters of local concern. It represents a sort of compromise between unitary government and confederate government. The territorial subdivisions of a country having the federal system are not mere administrative circumscriptions; they are widely autonomous political communities having constitutions and political organizations, mainly of their own creation. These communities, though not sovereign, usually bear the names of states and indeed have many of the characteristics of independent states. The governmental organizations of these latter communities are, not, however, entirely disconnected from and wholly independent of the control of the central government, as will appear later in this chapter. The term "federal government" in popular usage is applied to the government of the United States alone, but strictly speaking it is descriptive of the general system composed of both the national and state governments. Consequently the national government is only a part of the federal system, the state governments constituting the other part.

2. **Division of powers between the national and state governments.**—The principle upon which the powers of government are distributed between the Union and the states is that those affairs which are of common interest to the entire country and which require uniformity of regulation should be placed under the control of the national government, while all other matters, being merely of local concern, should be left to the regulation of the states. In other words, there should be a single central government for the regulation of national affairs and a number of local governments for the regulation of local affairs. The Constitution of the United States, therefore, confers on the national government the power to deal with such affairs as foreign relations, the regulation of commerce with foreign countries and commerce among the states, the waging of war, the coinage of money, the granting of patents and copyrights, and other matters of general interest.

The states being already in existence at the time the Union was formed, it was felt that the chief governmental authority should be left with them and that upon the newly created national government, toward which there was a feeling of more or less distrust and suspicion, should be conferred the regulation of only such matters as experience had shown could not wisely be left to state regulation. The states, therefore, were left largely as they were, though certain prohibitions were imposed upon their authority, such as seemed necessary to establish a more effective union and promote the general welfare. Some other countries having the federal system, like Germany, Canada, Australia and certain of the Latin American Republics, have gone further and conferred on their national governments the power to regulate such matters as marriage and divorce, banking, trade and industry, and even the whole field of civil, criminal and commercial law, including the law of procedure. In the United States there are some who advocate the further extension of federal jurisdiction along certain of these lines, particularly in respect to marriage and divorce, insurance, employment of labor in factories and generally the regulation of business and industry which have become national in scope.[1] Some well known public men have even suggested that if the Constitution cannot be so amended as to give this additional power to Congress the means for its exercise will be found through constructions of the Constitution.[2]

The evils that have grown up in consequence of the extraordinary variety of legislation among the different states, particularly in respect to divorce and commercial law, and the need of uniformity of law on these matters have led to a movement to secure concerted action among the states through the agency of commissions on uniform state legislation. The movement has resulted in some success and a number of uniform laws have been adopted by a considerable number of states. Thus a negotiable instruments law is now in force in forty states, a uniform warehouse receipts act in twenty-four states, a bills of lading act in nine states and a uniform sales act in nine states.

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[1] Compare the platform of the Progressive Party of 1912.

[2] See the address of Elihu Root, entitled, The States, How to Preserve Them; also the address of President Roosevelt at Harrisburg on October 4, 1906.

The Constitution of the United States is not only a frame of government but a distributing instrument for the delimitation of the respective spheres of national and state authority. It marks out in a positive manner a definite sphere of action for the national government and a separate and distinct sphere for the states and each within its own sphere is supreme. At the same time it has attempted to provide the necessary barriers to prevent either from encroaching upon the domain assigned to the other, and thus the balance between the Union and its component parts is harmoniously preserved.

The method of distributing the powers of government between the nation and the states is: The powers of the national government are specifically numerated, while to the states are reserved all other powers except such as have been specifically prohibited. The government of the United States is thus an authority of delegated powers while those of the states are reserved or residuary powers. This distinction is fundamental and of far reaching importance and it is at the basis of an important rule of construction; namely, that in case of doubt the presumption of law is against the existence of any power claimed by the Government of the United States. To remove all possible doubt in respect to the residuary character of the authority of the states the Tenth Amendment was added to the Constitution, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

3. **Classification of federal and state powers.**—The totality of governmental powers in the American federal system may be grouped into the following classes: (1) powers which may be exercised exclusively by the national government; (2) powers which although conferred on the national government may be exercised by the states so long as they are not exercised by the United States; (3) powers prohibited to the national government; (4) powers reserved exclusively to the states; (5) powers prohibited to the states; (6) powers prohibited to both the national and state governments. Among the powers that may be exercised only by the United States are such as relate to foreign relations, war, coinage of money, patents, and copyrights.

4. **Exclusive and concurrent powers.**—The question was early raised as to whether the mere grant of a particular power to Congress necessarily implied a prohibition on the exercise of the same power by the states, when there was no express denial to the states. The Supreme Court in passing on this question laid down the principle that where the exercise by the states of a power granted to Congress was incon-

sistent with the national theory of the Constitution; that is, where uniformity of regulation was essential, the power was exclusive in Congress. In other cases the states might exercise the power so long as Congress did not choose to do so, but subject always to the right of Congress to abrogate any laws passed by the states in the exercise of such a power.[3]

It is not the mere existence of the national power, but its exercise, says Judge Cooley, which is incompatible with the exercise of the same power by the states.[4] Mr. Justice Johnson of the United States Supreme Court stated the principle as follows: "The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of those being of vital importance to the state authority and state legislation, it is not to be admitted that the mere grant of such powers in affirmative terms to Congress, does, per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states."[5] Thus the national government is expressly authorized to pass bankruptcy laws, but the Supreme Court has held that the states may also legislate concerning bankruptcy subject to the condition that when Congress acts the operation of the state laws will be suspended.[6] The state laws are not repealed, however, and in case the legislation of Congress should be repealed or declared unconstitutional the effect would be to revive the operation of the state laws.

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[3] Sturges v. Crowninshield, 4 Wheat. 122 (U. S.).

[4] Principles of Constitutional Law, p. 35.

[5] Houston v. Moore, 5 Wheat. 1 (U. S.).

So in respect to the regulation of commerce the Supreme Court has held that the power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting all the states alike. When the subjects within that power are local in their nature or constitute mere aids to commerce, the states may provide for their regulation and management until Congress intervenes and supersedes their action.[7] Thus the states may legislate concerning such matters as pilotage, wharves, and harbors, they may enact quarantine laws forbidding entrance within their borders to persons suffering with contagious diseases, or forbidding the importation of diseased live stock, so long as such laws are reasonable; they may regulate the speed of trains running through their towns, may require railroad companies to elevate their tracks, to provide gates at crossings, to provide their cars with safety appliances, etc. Such legislation falls within the domain of the police power reserved to the states and, subject to the limitation that it must be reasonable and not amount to a regulation of commerce, it will be sustained by the Supreme Court.

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[6] **Sturges v. Crowninshield, 4 Wheat. 122 (U. S.), and Ogden v. Saunders, 12 Wheat. 213 (U. S.).**

[7] **Cardwell v. American River Bridge Company, 113 U. S. 205.**

5. **Powers prohibited to the national government.**—Having adopted the principle that the government of the United States should be one of granted powers it may seem strange that the framers of the Constitution should have considered it necessary to impose express limitations upon its authority. Nevertheless they feared that attempts would be made by Congress to construe the existence of other powers than those granted, and so out of precaution certain positive prohibitions were set to its authority. Thus Congress was expressly forbidden to suspend the writ of habeas corpus except in case of rebellion or invasion; to pass bills of attainder and ex post facto laws; to levy direct taxes except in proportion to population or indirect taxes except according to the rule of uniformity; to give preference to the ports of one state over those of another in respect to commercial regulations and to grant titles of nobility. The first eight amendments, as has already been pointed out, added other prohibitions.

Upon analysis it will be seen that some of these limitations are restrictions merely upon the *manner* in which the powers of Congress may be exercised, while others are absolute prohibitions on the exercise of certain powers in any manner whatsoever. In addition to the express prohibitions on the power of Congress there are certain limitations implied in those expressed or which are inherent in the very nature of the federal system. Thus, as the Supreme

Court has said, the Constitution in all its parts looks to the preservation of the states, from which it necessarily follows that Congress cannot exercise its powers in such a way as to interfere with the legitimate operation of the state governments or to impair their existence.

6. **Powers reserved to the states.**—The powers left to the states, from the very nature of the case, are impossible of enumeration. To some persons their powers seem insignificant as compared with those of the United States, largely because they are not specifically enumerated, but in reality they are vast in quantity and far reaching in importance. They include practically the whole domain of civil and religious liberty, education, suffrage, marriage and divorce, the domestic relations, contracts, business, trade, the ownership and disposition of property, and, for the most part, the whole field of the criminal law. It is impossible to enumerate their powers, and to detail them would be to catalogue all the business and social relationships, to examine all the foundations of law and order.[8] In the division of governmental powers between the nation and the states, says Bryce, the state gets the most and the nation the highest, and so the balance between the two is preserved.

7. **Powers prohibited to the states.**—While the powers of the states are residuary in character, and unenumerated, it was nevertheless thought wise to impose certain limitations on their authority in the interest both of national unity and of individual liberty. Accordingly they were expressly forbidden to

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[8] Wilson, The State, p. 487.

enter into treaties or alliances with foreign nations, to grant letters of marque and reprisal, to coin money, emit bills of credit, make anything but gold and silver a legal tender in the payment of debts, to pass bills of attainder or ex post facto laws, or laws impairing the obligation of contracts or to grant titles of nobility. By the Fourteenth Amendment they are also prohibited from abridging the privileges and immunities of citizens of the United States, or from depriving any person of life, liberty or property without due process of law or from denying to any person equal protection of the laws.[9]

8. **Implied powers.**—Although the government of the United States is an authority of delegated powers, they are not described in detail, but are stated only in the most general terms, and very early in our history the school of liberal constructionists asserted that Congress naturally had authority to exercise all such powers as were necessary and appropriate for carrying into effect the powers expressly granted.[10] They relied mainly on the clause which empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

It is also important to observe that the view of the liberal constructionists found support in the provisions of the Tenth Amendment where the powers reserved to the states are not stated to be those not "expressly" delegated to the United States, as was the language in the corresponding section of the Articles of Confederation, thus indicating that there were powers belonging to the government of the United States that were not expressly enumerated. From the beginning the Supreme Court adopted the view of the liberal constructionists that the authority of the national government was not absolutely limited to the exercise of the powers expressly granted and that the powers "necessary and proper" to carry into effect those granted were not to be interpreted in the sense of "indispensably" necessary. This rule of construction received its first affirmation by the Supreme Court in 1804 in the case of United States v. Fisher,[11] where Chief Marshall asserted that "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power."

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[9] See Part III.

[10] Madison in The Federalist, No. 44; Hamilton in The Federalist, No. 33; Story, Commentaries, § 1258.

But it was in the case of McCulloch v. Maryland,[12] decided in 1819, that the doctrine of implied powers was first analyzed in all its bearings and its scope fully elaborated. For the purpose of this discussion the question involved was, whether Congress in pursuance of its power to borrow money, pay the debts of the United States and provide for the common defense and general welfare, could establish a bank of the United States. After dwelling upon the powers expressly granted to Congress, Chief Justice Marshall pointed out the impossibility of prescribing in the text of the Constitution the means by which the government should in all future time execute its powers. Such an attempt, he said, would have changed entirely the character of the instrument and given it the character of a legal code. "Let the end," he said, "be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, are consistent with the letter and spirit of the Constitution, are constitutional."

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[11] 2 Cranch 358 (U. S.).

[12] 4 Wheaton 316 (U. S.), LEADING ILLUSTRATIVE CASES.

Examples of the exercise by Congress of powers which are implied from those expressly granted have been numerous. Among them may be mentioned the purchase of Louisiana, Florida and Alaska, the annexation of Hawaii and Texas, the acquisition of Porto Rico and the Philippines, the grant of land in aid of canals, railroads and educational institutions, and the construction of the Panama Canal.

9. **Resulting powers.**—Another class of federal powers are those which Judge Story described as "resulting powers" or those which result from the general aggregate of power conferred upon the national government. Congress has often, he said, exercised powers that are not expressly given nor ancillary to any single enumerated power. "It is not at all indispensable," he went on to say, "to the existence of every power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. It is allowable to

group together any number of them and to infer from them all that the power claimed has been conferred."[13]

Thus as a result of the totality of powers belonging to the United States as a sovereign and independent nation vested with full control over its foreign relations the national government has deduced the power to punish the counterfeiting in this country of the securities of foreign governments, the authority to annex by statute unoccupied territory, to establish in foreign lands judicial tribunals, to lease and administer foreign territory.[14]

10. **Inherent powers.**—Differing in essential particulars from implied powers and resulting powers are what is sometimes called "inherent" sovereign powers, that is to say, powers deduced from the fact of sovereignty. Thus the right to acquire foreign territory has sometimes been asserted as an inherent sovereign right rather than a right drawn from implication from some specific grant of authority.

The Supreme Court in several cases has apparently given some support to this theory of construction. Thus in the case of Knox v. Lee[15] it said: "The United States is not only a government but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments. * * * Such being the character of the general government it seems to be a self-evident proposition that it is invested with all those inherent and implied powers, which at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its function." This theory of construction is condemned by many writers on constitutional law, however, as unsound and dangerous, since if carried to its logical limits it would destroy the character of the national government as an authority of delegated powers.

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[13] Cohens v. Virginia, 6 Wheat. 264 (U. S.).

[14] Willoughby, Principles of the Constitutional Law of the United States, p. 54.

[15] 12 Wall. 557 (U. S.).

11. **Supremacy of federal authority.**—While it is a fundamental principle of the federal system that the national government and the states are each supreme within the sphere marked out for them, it is also true that in certain respects the national authority occupies a position of supremacy in respect to the states. First of all, its jurisdiction naturally extends over the territory out of which the states are constructed and therefore many of its officers and agents necessarily exercise their functions within the limits of the states and of course over those who are at the same time citizens of some particular state and who owe it allegiance and obedience. Conflicts of authority therefore sometimes occur, in which cases the decision as to whom the rightful authority belongs devolves upon the government of the United States. Ordinarily, such decisions are rendered by the judiciary.

It is a settled principle of our constitutional law that the United States has a right and a duty to punish resistance to its laws and to protect its officers when acting within their rightful spheres, wherever they may be.[16] Thus says the Supreme Court, "We hold it to be an inconvertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." [17] Again it says, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation and all its militia are at the service of the nation to compel obedience to its laws." [18] Likewise no state can punish as criminal an act authorized by a law of the United States or interfere in any way with a federal officer while engaged in the execution of such a law. On this point the Supreme Court has said:[19] "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state courts—the operations of the general government may at any time be arrested at the will of one of its members."

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[16] In re Neagle, 135 U. S. 1.

[17] Ex parte Siebold, 100 U. S. 371.

[18] In re Debs, 158 U. S. 564, LEADING ILLUSTRATIVE CASES.

[19] Martin v. Hunter's Lessee, 1 Wheat. 363 (U. S.).

Again, it is well established that no state may interfere in any manner whatsoever with the operation of any agency or institution established by the national government for the performance of its functions.

This principle was first affirmed by the United States Supreme Court in McCulloch v. Maryland,[20] where it was held that a state tax on the United States bank was unconstitutional. Chief Justice Marshall observed that "there was a plain repugnance in conferring on one government power to control the constitutional measures of another, which other with respect to those very measures is declared supreme over that which exerts the control." Holding that the power to tax is the power to destroy, he went on to say: "If the state may tax one instrument employed by the government in the execution of its powers, they may tax any and every instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial processes; they may tax all the means employed by the government to an excess which would defeat all the ends of the government. This was not intended by the American people. They did not design to make their government dependent on the states." In further extension of this principle the Supreme Court of the United States has held that the states may not tax the salaries of federal officers,[21] nor United States bonds,[22] nor interstate commerce.[23] On the other hand, the United States may not tax the salaries of state officers.[24]

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[20] 4 Wheaton 316, Leading Illustrative Cases.

12. **National control of state government.**—The government of the United States is vested by the Constitution with a certain power of control and supervision over the states. This power relates, first, to the form of government which the states may establish; and, second, to the manner in which they may exercise the powers reserved to them. In the first place, the Constitution imposes on the national government the duty of guaranteeing to the states a republican form of government, (Art. IV., § 4), though it does not undertake to define the term. Madison, in "The Federalist,"[25] defined it as "a government which derives all its powers, directly or indirectly, from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period or during good behavior."

It has recently been defined by a high authority[26] as "a government by representatives chosen by the people; and it contrasts on one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and on the other with the rule of one man, as king, emperor, czar, or sultan, or with that of one class of men, as an aristocracy.''

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[21] Dobbins v. Commissioners of Erie Co., 16 Pet. 435 (U. S.).

[22] Weston v. Charleston, 2 Pet. 449 (U. S.).

[23] Brown v. Maryland, 12 Wheat. 419 (U. S.). See Part V, TAXATION.

[24] Collector v. Day, 11 Wall. 113 (U. S.), LEADING ILLUSTRATIVE CASES.

[25] No. 39.

[26] Cooley, Principles of Constitutional Law, p. 213.

Madison considered hereditary tenures as inconsistent with the principles of republican government, although he regarded good behavior tenures, at least for the judiciary, as admissible. The question of whether the referendum in legislation was constitutional, since it might be considered as an institution of pure democracy rather than of republican government, was raised at an early day and the courts of a few states decided the question in the negative,[27] but this view is no longer followed[28] and the referendum has been adopted in many of the states.

The question of the right and duty of the national government to interfere in the affairs of a state to guarantee a republican form of government first came up in connection with the so called Dorr's Rebellion in Rhode Island in 1841, when an attempt was made to set aside by revolutionary methods the old constitution which greatly restricted the suffrage. A de facto government was organized in opposition to the existing government and riotous conflicts between the two authorities followed. Appeal was made to the President of the United States, who recognized the legality of the old government and took steps to protect it against revolutionary attacks and the Supreme Court declined to intervene.[29] The principle established by this case seems to be that where a dispute arises in a particular state as to which of two opposing governments is lawfully entitled to the obedience of the inhabitants it is not the duty of the United States to intervene unless it is called upon to protect the state against domestic violence, in which case it is the duty of the President to determine which is the lawful government. It may also become necessary for the legislative department of the government of the United States to act as when the Senate is called upon to admit the senators elected by one of the other disputing legislatures. In such a case the Senate would be obliged to determine which was the lawful legislature. The Supreme Court has taken the position that the duty of carrying out the guarantee belongs to the political departments of the government and that the federal judiciary has no jurisdiction in such cases.[30] In a recent case when the Supreme Court was appealed to determine which of two rival contestants for the office of governor of a state was entitled to the office it declined to take jurisdiction, declaring that the case was pre-eminently one for the jurisdiction of the state courts.[31]

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[27] For example, the Supreme Court of Delaware in Rice v. Foster, 4 Harrington 479.

[28] See Pacific States Telephone and Telegraph Company v. Oregon, 223 U. S. 118, LEADING ILLUSTRATIVE CASES.

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[29] For the facts of this affair, see Luther v. Borden, 7 How. 1 (U. S.). In this case the Supreme Court said: "It rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can be determined whether it is republican or not."

[30] In re Duncan, 139 U. S. 449.

[31] Taylor v. Beckham, 178 U. S. 548; see also Wise, Citizenship, p. 184.

13. **Rights and privileges of the states.**—The Federal Constitution secures to the states certain rights and privileges of which they cannot be deprived by the national government without their consent. Among these are the right of representation in the lower house of Congress in proportion to their populations and the right of equal representation in the Senate; the right to participate in the election of the President and the Vice President; the right of territorial integrity (that is, no new state may be formed within the jurisdiction of another state or by the junction of two or more states or parts of states without the consent of the legislatures concerned);[32] the right to equality of treatment with other states in respect to commercial regulations; immunity from being made the defendant in a suit in the federal courts by a citizen of another state or by citizens of foreign states;[33] the right to the protection of the United States against foreign invasion (very properly because the states are forbidden to keep troops or ships of war); and protection against domestic violence. Protection in the latter case, however, can be extended only when application has been made by the state legislature or if it be not in session, then by the governor. The purpose of this proviso is to re-

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[32] For the circumstances under which West Virginia was formed within the state of Virginia without the consent of the legislature of Virginia, see Burgess, Civil War and the Constitution, vol. II, pp. 230-233.

[33] However if the state begins the suit the individual may appeal to the United States Courts without being regarded as the plaintiff. Cohens v. Virginia, 6 Wheat. 264 (U. S.). Likewise, an individual may bring an action against a state officer to compel him to perform his duty or to prevent him from violating his duty and it will not be considered as a suit against the state. United States v. Lee, 106 U. S. 196; United States v. Schurz, 102 U. S. 378, and Davis v. Gray, 16 Wall. 203 (U. S.).

move the temptation to federal interference in state affairs for political or other reasons against the wishes of the inhabitants of the state. The duty of extending such protection rests on the President of the United States in pursuance of the act of Congress of 1795. Nevertheless if the disturbance is one which interferes with the operation of the national government or with the movement of interstate commerce the President is under no obligation to wait for a call from the state authorities.

Thus during the Chicago riots of 1894 President Cleveland ordered the federal troops to that city, against the vigorous protests of the governor, upon receiving information that the strikers were interfering with the transportation of the United States mails, and with the movement of interstate commerce as well as disregarding the writs and processes of the United States courts. The validity of his action was emphatically sustained by the United States Supreme Court.[34]

14. **Obligations and duties of the states—The full faith and credit clause.**—In most respects the states are in their relations with one another entirely separate and independent communities. Before the establishment of the Union the judgments of the courts of one state were treated as foreign judgments within the territory of another and could be impeached for fraud or prejudice and their merits re-examined.[35] The inconvenience of this situation led to the inser-

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[34] In re Debs, 158 U. S. 564, LEADING ILLUSTRATIVE CASES. See also Cleveland, Presidential Problems (1904), chap. 2.

[35] Willoughby, Constitutional Law of the United States, p. 76.

tion in the Articles of Confederation of a clause providing that full faith and credit should be given in each state to the acts, judicial proceedings and records of the other states, a provision which in almost identical language was incorporated in the Constitution together with an additional clause empowering Congress to prescribe by statute the manner in which these acts, records and proceedings shall be proved.

At the outset it is important to observe that the obligation imposed by this provision has reference only to judgments in civil cases, for no state is obliged to lend its support to the enforcement of the criminal laws of another state.[36] What it does mean is that civil judgments recovered in one state when proved in the courts of another state are not subject to re-examination on their merits, nor are they liable to impeachment for fraud, if they have been awarded by a court of competent jurisdiction. The effect is not to make the judgments of other states domestic judgments but only to give them a general validity, faith and credit as evidence. Likewise, a properly authenticated copy of a will or deed duly executed in one state will be taken notice of and rights depending on it will be enforced in other states as though the instrument were originally executed therein. So a marriage legally celebrated in one state will usually be treated as valid in another state.

But as to the effect in one state of a divorce granted in another state the matter is not so simple. In the rather recent case of Atherton v. Atherton[37] the

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[36] Wisconsin v. Pelican Insurance Company, 127 U. S. 265.

[37] 181 U. S. 155.

United States Supreme Court laid down the rule that where the husband and wife were domiciled in different states a decree of divorce granted in either state would have to be given full faith and credit in the other states. But this obligation holds good only when the state granting the divorce has jurisdiction and this depends on the fact of domicile of one or both of the parties—a question into which the courts of other states are at full liberty to inquire. It has been held by the United States Supreme Court that a divorce granted on constructive service by the courts of a state in which neither party is domiciled is void,[38] and that a divorce granted by the courts of a state in which the plaintiff has not a bona fide domicile is not binding upon the courts of other states.[39] Finally, in the recent case of Haddock v. Haddock (1906)[40] the Supreme Court overruled the existing practice by holding that the courts of one state were not bound to recognize the validity of a divorce obtained in another state which was the domicile of the plaintiff if the defendant had continued to reside in another state and had received only constructive notice. In short the court adopted the principle that an action for divorce is essentially an action in personam (against the person) and that a decree of divorce rendered without personal service on the defendant was not binding upon the courts of other states.[41]

15. **Extradition of fugitives from justice.**—The Constitution (Art. IV., § 2) declares that "a per-

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[38] Bell v. Bell, 181 U. S. 175.

[39] Andrews v. Andrews, 188 U. S. 14.

[40] 201 U. S. 562.

[41] Willoughby, Constitutional Law of the United States, p. 86.

son charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he has fled, be delivered up to be removed to the state having jurisdiction of the crime." An act of Congress passed to carry out the terms of this provision imposed upon the executives of the states the duty of delivering up fugitives from justice, but the Supreme Court of the United States has uniformly held that the obligation is one which is not enforceable by federal authority, that is, to say the obligation is only a moral one. Thus in several cases the Supreme Court has held that although the governor had no discretion in view of the facts presented and that he was under a moral obligation to perform a duty imposed upon him by the Constitution and the laws, there was no way by which he could be compelled to do so, and the court in each case refused to issue a mandamus directed to him.[42] A recent notable instance of the kind was the refusal of the governor of Indiana to deliver up to the governor of Kentucky an ex-governor of the latter state who was charged with complicity in the murder of his political rival and had taken asylum in Indiana.

It is hardly necessary to say that no obligation rests upon the governor to deliver up a fugitive until competent evidence has been placed before him that the accused is in fact a fugitive from justice, though he has no right to refuse merely because he believes that the fugitive cannot obtain a fair trial in the state whose laws he has violated and from whose jurisdiction he has fled. The obligation to deliver up a criminal exists only when he is a fugitive. Thus where an individual sets in motion in one state a train of causes that produces death in another state or where he stands on one side of a boundary line and kills a person on the other side, the executive of the state in which the crime takes effect cannot demand the delivery up of the offender, for the reason that he is not a fugitive. The Court of Appeals of New York in the case of Hyatt v. New York,[43] affirmed by the Supreme Court of the United States, held that a person indicted in one state for a crime committed through his agency though he was not personally within the state at the time cannot be extradited from another state to be tried in the state where the crime was committed. In other words, a man cannot be regarded as a fugitive from the justice of a state in which he was not personally present.

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[42] Holmes v. Jennison, 14 Pet. 540 (U. S.); Kentucky v. Dennison (1860), 24 How. 66 (U. S.); ex parte Reggel, 114 U. S. 642.

It has also been held that no mode is provided by the Constitution or laws of the United States by which the federal authorities may restore a fugitive who has been forcibly abducted from the state in which he had taken asylum and returned to the state from which he had fled.[44] Likewise a fugitive who has been returned to the state from which he fled has no immunity from trial for other offenses than that upon which he has been extradited, though the Supreme Court has said that it is not honorable to secure the extradition of a man on one charge and then try him on another.[45]

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[43] 188 U. S. 691.

[44] Mahon v. Justice, 127 U. S. 700.

In the early history of the country the right of the state executives to surrender fugitives from the justice of foreign countries was sometimes affirmed and a statute passed by the legislature of New York in 1822 authorized the governor to deliver up such fugitives. This statute, however, was declared unconstitutional in 1872 by the state court of appeals on the ground that the surrender of criminals to foreign governments was exclusively a power of the national government.[46] Although the question has never been actually decided by the Supreme Court it may now be regarded as settled doctrine that the states do not possess such power.[47]

16. **Interstate rights of citizenship.**—The Constitution (Art. IV., § 2) declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, a clause taken from the Articles of Confederation. It imposes on the state the obligation to treat the citizens of other states as it treats its own citizens; that is, without discrimination. The Supreme Court of the United States[48] has well stated the purpose of this clause to be: "To place the citizens of each state upon the same footing with citizens of other states, as far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits

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[45] Lascelles v. Georgia, 148 U. S. 537.

[46] People v. Curtis, 50 N. Y. 321.

[47] Moore, Digest of International Law, vol. IV, p. 240.

[48] Paul v. Virginia, 8 Wall. 168 (U. S.).

discriminating legislation against them by other states; it gives them the right of free ingress in other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in the other, and giving them equality of privileges with citizens of those states, the Republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

But the court has never attempted an exhaustive enumeration of the particular privileges and immunities guaranteed by this clause. In an early case[49] in the United States Circuit Court (1823) Mr. Justice Washington, discussing the subject, said: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of rights to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, all be comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." It should be observed that the privileges here guaranteed are not political privileges but rather civil rights. The provision does not mean, for example, that an illiterate man who enjoys the right to vote in one state may upon removal to another state where an educational qualification is required for the suffrage claim the right to vote in such state notwithstanding his illiteracy. Nor does it mean, to take another example, that a woman who is a member of the bar in one state may upon removal to another state where women are excluded from practicing law demand the right to be admitted to the bar on the same terms as male citizens.[50] What it does mean is that whatever privileges and immunities a state chooses to allow its own citizens it must allow the citizens of other states on the same terms and subject to the same conditions. Thus it cannot discriminate against the citizens of other states in respect to taxes or trade privileges.[51] Nevertheless it may impose upon non-residents certain non-discriminative and reasonable restrictions for the protection of its own citizens or its peculiar industries. Thus it may require non-resident suitors in its courts to give bond for costs when bonds in similar cases are not required of its own citizens and the Supreme Court laid down the principle in a well known case[52] that a state might exclude the citizens of another state from participating in its oyster fisheries, because of the peculiar proprietary character of such an industry. Finally, the Supreme Court has laid down the rule that the privileges and immunities secured by this clause cannot be claimed by corporations, since corporations are not citizens within the meaning of the term as here used.[53] One state may therefore impose such restrictions as it sees fit upon foreign corporations before admitting them to do business within its borders or exclude them entirely from the state.

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[49] Corfield v. Coryell, 4 Wash. C. C. 371.

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[50] Bradwell v. State, 16 Wall. 130 (U. S.); Blake v. McClung, 172 U. S. 239.

[51] Ward v. Maryland, 12 Wall. 418 (U. S.).

17. **Federal coercion of a state.**—In addition to the obligations and duties mentioned above it is clearly the duty of the state to carry out the mandates of the Federal Constitution relating to the election of United States senators and representatives and presidential electors and to perform in good faith all their other obligations as members of the Union, without the performance of which the continued existence of the Republic would be impossible. It is to be observed, however, that the federal authorities have no constitutional right to coerce a state as such. The Constitution of the German Empire, where the federal system of government is the form now in existence, expressly empowers the Bundesrath or Upper Chamber of the Parliament to decree fed-

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[52] McCready v. Virginia, 94 U. S. 391.

[53] Paul v. Virginia, 8 Wall. 168 (U. S.).

eral execution against a delinquent state and when it is done it becomes the duty of the Emperor to employ force to compel the state to fulfill its obligations as a member of the Empire. But the Constitution of the United States gives no such power to any department of the federal government.

Madison remarked in the Constitutional Convention of 1787 that the use of force against a state would be tantamount to a declaration of war against it and would probably be considered by the party attacked as a dissolution of the Union. But it is only against the states in their organized corporate capacity that the coercive authority of the national government may not be applied. As has already been pointed out in this article, it is the undoubted right of the United States to compel by force, obedience to its laws by every citizen of the United States, to protect its officers in the rightful discharge of their duties and to brush away every obstruction to the enforcement of its laws. It was in the exercise of this right that President Lincoln called out the troops in 1861 and not for the purpose of coercing the seceded states to remain in the Union. In his inaugural address Mr. Lincoln assumed the true constitutional position when he said he had no purpose, as he had no right of waging war against any state; indeed, he argued, it was not the states as such that were the offenders but individuals and it was against these that coercion was to be applied. In his proclamation of April 15, calling out the militia he recited that the laws were being opposed and their execution being obstructed by combinations too powerful to be suppressed by the ordinary course of procedure. Lincoln's view that the states could not secede and that the acts of the conventions and legislatures of the Southern States were insurrectionary and unlawful was the view adopted by the Supreme Court after the war. In the famous case of Texas v. White it declared that the Constitution in all of its parts looked to the preservation of the states and that the Union was an indestructible union composed of indestructible states.[54]

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[54] 7 Wall. 700 (U. S.), LEADING ILLUSTRATIVE CASES.

CHAPTER II.

POWERS OF THE PRESIDENT.

18. Distribution of powers among departments.—The Constitution of the United States declares that "all legislative powers herein granted shall be vested in a Congress of the United States * * * the executive power shall be vested in a President of the United States * * * the judicial power shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish."[55]

The views of Montesquieu, who was the first modern political writer to treat the principle of the separation of the powers of government as a fundamental principle of liberty, were a part of the political philosophy of the American and French Revolutions and found almost universal recognition in the early state constitutions.[56] The importance of this principle in the organization of the federal government has been lately stated by the Supreme Court in the following language: "It is believed to be one of the chief merits of the American system of written constitutional law that all powers entrusted to the government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial; that the function appropriated to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the powers appropriated to its own department and no other.''[57]

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[55] For treatment of the Federal Judiciary, see subject, COURTS.

[56] See Garner, Introduction to Political Science, pp. 414-416.

The idea, however, that legislative, executive and judicial powers should be entrusted to separate and distinct organs has never been carried out strictly in practice. Moreover, there has never been a constitution in which the executive, legislative and judicial departments were not more or less connected and dependent one upon the other. Speaking of the exceptions to the principle of separation of powers in the original state constitutions, Madison said ''we find, notwithstanding the complicated and, in some instances, the unqualified terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separated and distinct.''[58] Likewise the framers of the Federal Constitution also recognized the impossibility if not the undesirability of an absolute separation. Madison himself stated all that the principle should aim at when he said: ''The powers properly belonging to one department ought not to be directly and completely administered by either of the other departments.''[59] The authors of the Federal Constitution therefore made no attempt to confine the exercise of all the executive power to the executive department, or all the legislative power to the legislative department, or all the judicial power to the judicial department. Administrative convenience and practical expediency were with them the determining factors rather than mere political theory.[60] Thus upon the Senate as a branch of the legislature they conferred a share in the appointing and treaty making powers and also the judicial function of trying impeachment cases; both houses were made the sole and exclusive judge of the qualifications of their own members; upon the executive they conferred a share in the function of legislation, through the power of veto, of recommending legislative measures and of calling extraordinary sessions of Congress, also the judicial function of granting pardons; and upon the courts a limited power of appointment and by statute they have the legislative power of framing their own rules of practice. No one of the departments in fact exercises all the power which upon a strict interpretation of the nature of that power belongs to it.[61] The exercise of functions may be entirely separated but not the departments themselves if government is constructed on practical lines.[62] The several departments constitute a ''brotherhood whose constant trust requires a mutual toleration of what seems to be a 'common because of vicinage' bordering on the domains of each.''[63]

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[57] Kilbourn v. Thompson, 103 U. S. 168.

[58] The Federalist, No. 46.

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[59] The Federalist, No. 47.

[60] Compare Bondy, Separation of Governmental Powers, 297.

[61] Compare Noble v. Indiana, 118 Ind. 350.

[62] Compare Goodnow, Politics and Administration, p. 14.

Some powers are by their nature strictly legislative, others strictly executive and others judicial. Still others are such only because they have been vested by the Constitution or laws in a particular department. In other cases it devolves upon the courts to determine whether a particular power is legislative, executive or judicial and the decisions of the courts on such questions are not always uniform. Thus some courts have decided that the power to grant divorces is judicial in character, others that it is legislative. Again, rules of court practice are sometimes made by the legislature and sometimes left to the courts themselves. The Supreme Court of the United States has been rather strict in its decisions regarding the separation of powers. Thus it very early held that the duty of passing on pension claims when its determinations were reviewable by the Secretary of War could not be imposed upon the judges of the federal courts, since the power was not judicial in its nature,[64] and it has laid down the rule that Congress has no general power to punish for contempt persons disobeying its orders, though it may compel outsiders to testify or produce papers relating to matters which Congress has an undoubted right to inquire into.[65] It may also punish a contumacious witness for refusing to testify concerning charges against the integrity of its own members.[66]

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[63] Brown v. Turner, 70 N. C. 93.

[64] Hayburn's Case, 2 Dall. 409 (U. S.).

[65] Kilbourn v. Thompson, 103 U. S. 168.

[66] In re Chapman, 166 U. S. 661.

Theoretically equal in authority the three departments are not so in fact. Judge Story has remarked with obvious truth that in all governments the legislative department is in fact the most powerful of the three and the judiciary the weakest.[67] The legislature is not only vested with the legislative power, but it exercises a large control over the other departments and is in a sense the regulator of the administration.[68] It controls the sources of supply and confers upon the other departments many of the powers which they exercise. The very existence of the Federal Judiciary is in a sense dependent upon the legislative branch since Congress fixes the number of judges and provides for their support. The judiciary itself possesses no control over the source of supply or over the armed forces and it is of course dependent upon the executive for the enforcement of its orders and judgments. It cannot, as Judge Story has aptly remarked, lay taxes, command armies or appoint officers; in short, it has no powers that can be wielded for itself. One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the legislative authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed.

The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[69] But there are certain limitations to the general principle here stated. Thus it is a settled rule of American constitutional law that the legislative department may delegate to subordinate legislative bodies the power of local legislation since this is a fundamental and necessary principle of local self-government. It is also well settled that the legislature may enact a statute and make its taking effect depend upon some subsequent event to be determined by the executive. In such a case the executive does not legislate, he does not determine any question of policy, but he simply ascertains the existence of the fact prescribed by the statute as the condition upon which it shall be put into operation.[70] The power of the executive to issue administrative ordinances or regulations prescribing the manner of enforcing statutes is also well recognized though of course he may not modify or add anything to the statute which he is charged with enforcing.[71] The power of the legislature to delegate to administrative boards or commissions the power to prescribe rates to be charged by public service corporations is also well recognized. Thus the interstate commerce act of 1906 gave the interstate commerce commission the power to prescribe

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[67] Commentaries, § 534.

[68] Compare Goodnow, Comparative Administrative Law, vol. I, p. 31.

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[69] Cooley, Constitutional Limitations, p. 163.

[70] Field v. Clark, 143 U. S. 649.

[71] See § 19 and following.

"just and reasonable" rates to be charged by railroads engaged in interstate commerce, subject of course to the right of the judiciary to review such determinations in accordance with the constitutional guarantee that private property shall not be taken without due process of law.

19. **The President—Powers and duties.**—The powers and duties of the President are conferred partly by the Constitution, partly by acts of Congress and treaties, and are partly the result of usage and precedent. These powers may be grouped under the following general heads: (1) the power of appointment; (2) the power to execute the laws; (3) the conduct of the foreign relations of the United States; (4) powers in relation to legislation; (5) military powers; and (6) the power to grant pardons. In the early history of the Republic the President was primarily a political chief, his administrative functions being of relatively less consequence. This was due in part to the comparative insignificance of the administrative service and in part to the lack of an effective system of control over the administrative service. But in the course of the nineteenth century his rôle as administrative chief received an enormous extension, while at the same time his control over the administrative service became fully recognized.[72]

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[72] Compare Fairlie, The National Administration of the United States, p. 2. Mr. Woodrow Wilson conceives the rôle of the President to be not merely that of the legal executive, but the chief of his party, responsible for the fulfillment of its pledges to the people, and also the guide and leader of the nation in legislation with a very positive share in the formulation of legislative policies. Constitutional Government in the United States, chap. 3.

20. Power of appointment and removal.—The Constitution (Art. II, § 2, cl. 2) declares that the President "Shall, with the advice and consent of the senate, appoint all ambassadors and other public ministers and consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may vest the appointment of such inferior offices as they think proper in the President alone, in the courts of law or in the heads of departments." It is hardly necessary to say that the offices to be filled by the President are such only as are created by law, for the European custom which attributes to the executive the power to create certain public offices is unknown in this country. It follows from the above quoted constitutional provision that Congress cannot itself make appointments[73] or confer the power of appointment on any other authority than that provided in the Constitution,[74] or in any way abridge the constitutional prerogative of the President in respect to appointments.

It seems to be settled, however, that Congress has the power to pass a civil service statute requiring that appointments shall be made from certain classes of persons who have satisfied certain educational or other tests prescribed by a civil service commission. This, however, is not an abridgment of the President's right to appointment, but rather a regulation of the manner of appointment. The Constitution does not define the term "inferior officers" and the question has never become important, mainly for the reason that Congress has shown no disposition to prescribe the alternative modes of appointment for any but distinctly subordinate officers. Should Congress undertake to determine by law the appointment of such officials as heads of departments, the chief diplomatic representatives or other principal officers, the question of its right to do so would no doubt be brought before the Supreme Court for its determination. In regard to appointments, the only constitutional restriction on the power of the President is that he shall obtain the advice and consent of the Senate. At first there was some disposition to claim for the Senate the right of initiation, that is the right to nominate, thus leaving to the President merely the formal power to appoint those suggested to him by the senators, but this claim was so manifestly contrary to the constitutional provision that it was not pressed. Nevertheless, individual senators through the development of the custom of "senatorial courtesy" have in fact acquired an important influence in the selection of local federal officers, as a result of which the power of the President in such cases has come to be merely the formal one of appointing those who are recommended to him by the senators from the state in which the officers fulfill their functions.[75]

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[73] United States v. Germaine, 99 U. S. 508; United States v. Ferreira, 13 How. 40 (U. S.).

[74] Ekiu v. United States, 142 U. S. 651.

The Constitution expressly provides for but one method of removal of public officers, namely that by impeachment, but from the beginning it was recognized that there was another method. Until 1867 the right of the President alone without the consent of the Senate to remove all federal officers except, of course, the judges, who serve during good behavior, was recognized and followed in practice. In the latter year this rule of construction, after having been followed for seventy-eight years, was repudiated by the Tenure of Office Act passed in consequence of the controversy between Congress and President Johnson. This act embodied in the law the principle that the President might remove only with the consent of the Senate. Enacted to meet a special emergency the law was amended in 1869 upon the accession of General Grant to the Presidency and in 1887 it was entirely repealed. Thus the early custom was reverted to and has been followed ever since.

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[75] See an article by A. Maurice Low, entitled The Usurped Functions of the Senate, in the American Political Science Review, vol. I, p. 1 and following.

As the law is now interpreted the President's power of removal is absolute. He may remove at any time or for any reasons which he may judge fit and proper even before the expiration of the commission which the officer holds.[76] Moreover, it has been held that Congress may not limit this by an act prescrib- that an officer may be removed only for inefficiency, neglect of duty, or malfeasance in office. Nor may the President be required by an act of Congress to give notice of the charges against an officer or accord him a hearing.[77] Nevertheless, where Congress, in pursuance of its constitutional right, vests the appointment of inferior officers in the heads of departments it may regulate and restrict the power of removal.[78]

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[76] Parsons v. United States, 167 U. S. 324.

[77] Shurtleff v. United States, 189 U. S. 311.

21. **Power of direction.**—As a result of the absolute power of removal is the power of direction within certain limits. The Constitution nowhere expressly authorizes the President to direct the heads of departments or other officers, but it charges him with taking care that the laws are faithfully executed, and the acts of Congress organizing certain of the executive departments recognizes in him a power of direction, notably the acts organizing the departments of State and of War. The act organizing the department of the Treasury contains no reference, however, to any power of direction on the part of the President; on the contrary, it indicates an intention to keep the administration of the national finances under the supervision of Congress, to whom the Secretary of the Treasury alone of the Cabinet officers is required to make his reports.[79]

At first the Supreme Court was inclined to hold that the President had little or no power to direct a head of a department as to how he should discharge his duties,[80] but in fact the President through his power of removal could and did exercise a directory control over his subordinates. As is well known, it was by this means that President Jackson compelled the Secretary of the Treasury to remove the federal deposits from the United States Bank. It is now generally recognized that the President has a large inherent power of direction over his subordinates and many statutes in fact give him express authority to issue instructions and orders to the heads of departments. Thus the Secretary of State in the conduct of foreign affairs is almost wholly under the control of the President; the Secretary of War is subject to his direction in regard to the disposition of the armed forces, and the Attorney General is also largely under his direction in regard to the institution of proceedings against persons, corporations or trust·charged with violations of the law. The President is not bound to show express statutory authority for everything that he does, for the government could not in practice be administered on any such narrow principles.[81] But the opinion once expressed by Attorney-General Cushing, in 1855,[82] that no head of a department can lawfully perform an official act against the will of the President, represents an extreme view that can hardly be defended. Many of the duties of the heads of departments and sometimes of other subordinate federal officers are prescribed by law and of course the President cannot modify these duties or require the officers to perform them in a manner different from that prescribed by law.

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[78] United States v. Perkins, 116 U. S. 483.

[79] Goodnow, Administrative Law of the United States, p. 78.

[80] Kendall v. United States, 12 Pet. 610 (U. S.).

22. **Power to execute the laws.**—The Constitution (Art. II., § 3) provides that the President "shall take care that the laws are faithfully executed." The responsibility rests ultimately upon him alone.

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[81] 6 Opin. Attorney General 365.

[82] 7 Same, 453.

Unlike the organization of the executive power in the states the responsibility is not divided between the chief executive and a number of colleagues over whom he has little or no control. He stands alone and at the head of the administrative hierarchy and those who are charged with aiding him in the execution of the laws are his subordinates, not his colleagues. It is the duty of the President to preserve, protect and defend the Constitution, to see that the laws enacted in pursuance thereof, the treaties made under its authority and the orders and judgments of the federal courts are enforced throughout the United States. For this purpose he is vested, as has already been pointed out, with the appointment and removal of all administrative officers upon whom he must depend for assistance, and the armed forces of the United States are at his disposal in case of resistance to the laws and authority of the United States and they may be employed by him in such manner as he may see fit to overcome such resistance.

23. **Power in respect to foreign relations.**—The Constitution (Art. II., § 2) provides that the President shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur. The President is also empowered to appoint all diplomatic representatives and to receive the representatives of foreign powers accredited to the government of the United States. The power to receive foreign representatives is not merely a ceremonial function but it involves the power to recognize the independence of the country which they represent or to refuse such

recognition.[83] Some of the early Presidents occasionally sought the advice of the Senate in advance before beginning negotiations,[84] but in recent years the practice has been to consult the Senate only on the question of ratification, so that "advice and consent" has come to mean in practice simply "consent." Sometimes the Senate has by resolution requested the President to open negotiation with a particular country in regard to certain matters, but this practice has been rare.

The President exercises his power of negotiation through the Secretary of State, who in important negotiations usually keeps his chief informed of their progress and from time to time consults with him on the questions that arise. Ratification of a concluded treaty belongs to the President, who, however, can act only upon the advice of the Senate. Although the Constitution is silent on the question of the right of the Senate to amend a treaty (or, more correctly, to advise ratification upon certain conditions), the power has often in practice been exercised by the Senate. But in such cases the treaty must necessarily be returned to the government of the other contracting party for its concurrence in the amendments, unless the President decides to drop the negotiations. If the Senate may amend a treaty as negotiated by the President, it may also reject the treaty in toto and has done so in many instances.[85]

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[83] Moore, Digest of International Law, § 638.

[84] For the particular instances, see Crandall, Treaties, Their Making and Enforcement, pp. 54-60.

[85] See Crandall, Treaties, Their Making and Enforcement, p. 72, for various examples.

While the advice and consent of the Senate is necessary to the ratification of all treaties, it is well settled that there is a class of executive agreements which the President may conclude and put into force without the approval of the Senate. Examples of such agreements are: the exchange of notes with Great Britain in 1817, limiting the naval forces of the two governments on the Great Lakes; the protocol of 1898 with Spain, for the appointment of Commissioners to negotiate a treaty of peace; the protocol of 1901 with China, in regard to indemnities on account of the Boxer outrages; the *modus vivendi* of 1891 with Great Britain, limiting the killing, for a fixed period, of fur seals in the Behring Sea; the protocol of 1903 with Cuba, for the lease of certain coaling stations; and various other protocols, *modi vivendi* and private claims conventions.[86] While the House of Representatives is given no direct share in the treaty-making power, it nevertheless participates indirectly in the case of treaties requiring appropriations of money or legislation necessary to carry them into effect. Treaties containing commercial stipulations, and particularly reciprocity treaties, must be approved by Congress, and at the request of the Senate itself a stipulation was inserted in the reciprocity treaty with Cuba in 1903 to the effect that the treaty should not take effect until approved by Congress. Finally, Congress may alter or abrogate entirely by legislative act an existing treaty, and a treaty may supersede an act of Congress.[87]

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[86] See an article by Professor J. B. Moore, entitled Treaties and Executive Agreements, in the Political Science Quarterly for September, 1905; also Crandall, already cited, p. 85 and following.

Although there are no express limitations on the treaty-making power such as are set to the legislative authority, it has never been contended that the power was unlimited. Thus says the Supreme Court: "The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent."[88]

24. **Power in relation to legislation.**—The share of the President in legislation is both positive and negative in character. Under the first mentioned head, he is required to furnish Congress from time to time information concerning the state of the Union and to recommend for its consideration such measures as he may judge necessary and proper. This requirement rests on the obvious fact, as Judge Story observed, that he possesses more extensive sources of knowledge in regard to the state of public affairs than any one else and is also more familiar with the practical working of the laws and hence is in a better position to recommend legislation for their improve-

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[87] Foster v. Neilson, 2 Pet. 253 (U. S.); Prevost v. Greneaux, 19 How. 7 (U. S.).

[88] Geofroy v. Riggs, 133 U. S. 258; also Moore's Digest of International Law, vol. V, §§ 735-737.

ment.[89] The information with the accompanying recommendations is contained in the annual message and in such special messages as the President may communicate to Congress from time to time. The President is also empowered to call extraordinary sessions of Congress whenever in his judgment the public necessities require. The Senate has often been convened without the House of Representatives, to approve the nominations of the President. The lower house, however, has never been assembled without the Senate and it is difficult to conceive a situation which would justify its being called without the Senate. The President is also authorized to adjourn the two houses in case of a disagreement between them as to the time for adjourning. Such a disagreement has never occurred but once (November, 1903) and then the President did not exercise his power, as it was near the approach of a regular session. Included under the legislative functions of the President may be mentioned his ordinance power, that is, the power to issue orders and regulations binding upon certain categories of officials and thus having the character of subsidiary administrative law. Some of these regulations are issued in pursuance of express authority conferred on him by acts of Congress, while others are issued as a result of his general power to take care that the laws are faithfully executed.[90] Executive regulations not expressly authorized by statute, when issued as an aid to the execution of the laws, and many regulations issued by the President as the commander-in-chief, have been repeatedly sustained by the Supreme Court.[91]

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[89] Commentaries, § 156.

[90] Fairlie, National Administration of the United States, p. 21; Goodnow, Comparative Administrative Law, vol. I, p. 72. See also an article by E. M. Parker, entitled Executive Judgments and Executive Legislation, in the Harvard Law Review for December, 1906.

Finally, the Constitution (Art. I., § 7, cl. 2) gives the President a negative participation in legislation through his power of veto, which, however, may be overridden by a two-thirds majority of the two houses of Congress. He may exercise the power in respect to joint resolutions as well as to bills (though as to concurrent resolutions the practice is not to submit them to the executive), and he may veto a bill for reasons of public policy or expediency as well as for reasons of unconstitutionality. Unlike many state executives, however, he has no power to disapprove particular items in appropriation bills, as a result of which he is sometimes compelled to approve large appropriation bills containing items which are objectionable to him, or veto the entire bill. The better opinion seems to be that the President may not sign a bill after the adjournment of Congress.[92]

25. **Military powers.**—The President is by the Constitution (Art. II., § 2, cl. 1) made the commander-in-chief of the army, the navy and the militia when it is called into the service of the United States. Declarations of war, however, can only be made by Congress and it belongs to Congress to arm, equip and provide for the training and discipline of the

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[91] United States v. Eliason, 16 Pet. 301 (U. S.).

[92] La Abra Silver Mining Co. v. United States, 175 U. S. 423.

forces. The President, as commander-in-chief, decides where the troops are to be located, and where the ships are to be stationed. It is upon his orders that the troops are mobilized, the fleets assembled, and the militia of the states called out. He may do whatever, in his judgment, may conduce to the destruction of the power or to the weakening of the enemy, so long as he acts within the accepted rules of international law. His power is limited only by the requirements of military necessity. It was in the pursuance of this power that President Lincoln issued the emancipation proclamation freeing the slaves in certain of the Southern states during the Civil War.

When an enemy's territory has once been occupied by the army, the President, as commander-in-chief, may assume control and govern it through such agencies and in such manner as he may see fit. He may displace the existing authorities or make use of them as he wishes. He may appoint military governors and set up tribunals in place of the existing courts. He may suspend the writ of habeas corpus, institute martial law, and deprive the inhabitants of other safeguards established by the Constitution for their protection against the arbitrary encroachments of the government. The Supreme Court laid down the rule in 1866, however, that the President cannot declare and maintain martial law in a part of the country where the civil courts are open and in the proper and unobstructed exercise of their judicial functions.[93] The President's military power is further increased as a result of the duty imposed upon him of protecting the states against invasion and domestic violence, a subject already discussed in the preceding chapter. By statute he is authorized to employ the army, the navy and the militia "whenever, by reason of unlawful obstructions, or assemblages of persons, or rebellion against the authority of the government of the United States, it shall become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings the laws of the United States within any state or territory."[94] The President is the sole judge of the existence of the facts upon which he is authorized to act and his decision is not reviewable by any court.[95]

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[93] Ex parte Milligan, 4 Wall. 2 (U. S.).

26. **Power to grant pardons.**—The Constitution (Art. II., § 2, cl. 1) declares that the President shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment. A pardon was defined by Chief Justice Marshall as "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed."[96] The President cannot, of course, pardon offenses against state laws, but with the exception of impeachment offenses his power to pardon for offenses against the laws of the United States is without restriction. He may pardon an offender before as well as after conviction

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[94] Act of July 29, 1861.

[95] Martin v. Mott, 12 Wheat. 19 (U. S.), LEADING ILLUSTRATIVE CASES.

[96] United States v. Wilson, 7 Pet. 150 (U. S.).

or during the trial of the offense[97] and may grant a pardon upon condition. Congress may not restrain or limit his power by enacting that the acceptance of a pardon shall be conclusive evidence of guilt and that persons whose guilt is thus established shall be excluded from the right of enforcing certain claims against the government.[98]

The power to pardon is sometimes exercised before conviction by proclamation in the case of large numbers of persons who have become liable to criminal prosecution for participation in rebellion or concerted resistance to the laws. Examples were the Amnesty Proclamations of Presidents Lincoln and Johnson in 1863 and 1865, offering pardons under certain conditions to persons in arms against the United States, and the Proclamation of President Harrison in 1889, offering amnesty to the Mormons who had violated the anti-polygamy laws of the United States. The power to pardon includes the power to commute a sentence from a heavier to a lighter penalty or to remit a fine in part or entirely.

27. **Remedies against the action of the President.**—As the chief executive the President is exempt from the jurisdiction of any court and from responsibility to any authority except the Senate organized as a court of impeachment, and then only for criminal acts as opposed to political acts. This body may try him for treason, bribery or other high crimes and misdemeanors only when the charges have been preferred by the House of Representatives. Upon con-

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[97] Ex parte Garland, 4 Wall. 333 (U. S.).

[98] United States v. Klein, 13 Wall. 128 (U. S.).

viction, the Senate is required to remove him from office, and it may in addition disqualify him from ever holding office in the future. After the judgment of the Senate has been pronounced the President is stripped of all his official privileges and may then be arrested, imprisoned, tried and condemned like any other citizen for any crime or misdemeanor which he may have committed while in office.

The reason for this exemption of the President from the jurisdiction of the courts does not rest on the principle that the President can do no wrong, but upon reasons of public policy and expediency. If he were subject to the processes of the courts his power and duty to execute the laws might be seriously interfered with. Furthermore, it would result in bringing the executive and judiciary into conflict, for it would be impossible to execute a process against the President should he resist, since the whole machinery of execution is by the Constitution placed in his hands. He might also pardon himself and thus render nugatory any attempt to make him amenable to the courts.[99] Chief Justice Marshall, in the case of Marbury v. Madison, speaking of the power of the courts to control his political or discretionary acts, said: "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and so excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are by the Constitution and laws submitted to the executive, can never be made in this court."[1] "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion and is answerable only to his country in his political character and to his conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which the executive discretion may be used, there still exists and can exist no power to control that discretion." Again the court said in a notable case: "The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power."[2] During the trial of Aaron Burr for treason, Chief Justice Marshall, who presided over the trial, issued a subpoena directed to President Jefferson, requiring him to produce a certain paper relating to Burr's acts, but the President declined to obey the writ,[3] and the Chief Justice did not regard it worth while to issue an attachment or proceed further against the President.

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[99] Compare Burgess, Political Science and Constitutional Law, vol. II, p. 246.

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[1] 1 Cranch 170, LEADING ILLUSTRATIVE CASES.

[2] Kendall v. United States, 12 Pet. 524 (U. S.).

[3] Jefferson gave the following reasons for declining to obey the writ: "The leading feature of our Constitution," he said, "is the independence of the Legislature, Executive and Judiciary to each other; and none are more jealous of this than the Judiciary. But would the Executive be inde-

The Supreme Court in a well known case declined to consider an application for an injunction against the President to restrain him from enforcing an act of Congress alleged to be unconstitutional,[4] and when the President disregarded a writ of habeas corpus issued by the Chief Justice, the court declined to take further action to compel the observance of its process.[5] Nevertheless the Supreme Court will exercise control over the subordinates of the President, and since he acts in most cases through agents, the administration is as a result brought under a certain judicial control.[6] Thus the courts will refuse to enforce unconstitutional orders and an illegal order of the President will afford no protection to a subordinate who acts in pursuance of such an order.

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pendent of the Judiciary if he were subject to the commands of the latter, and to imprisonment for disobedience; if the smaller courts could bandy him from post to post, keep him constantly trudging from north to south and east and west, and withdraw him entirely from his executive duties?" McCaleb, The Aaron Burr Conspiracy, p. 326.

[4] Mississippi v. Johnson, 4 Wall. 475 (U. S.).

[5] Ex parte Merryman, Taney's R. 246 (U. S.).

[6] United States v. Schurz, 102 U. S. 378.

13; *McClain, E.*, Constitutional Law in the United States (2d ed.), New York, 1910, chaps. 20-23, 18; *Patterson, C. S.*, The United States and the States under the Constitution (2d ed.), Philadelphia, 1904, chap. 12; *Pomeroy, J. N.*, Constitutional Law, chap. 5; *Story, Joseph*, Commentaries, chap. 37; *Tucker, J. R.*, Constitutional Law of the United States, chap. 12; *Willoughby, W. W.*, Principles of Constitutional Law of the United States, New York, 1912, chaps. 49-52; *Willoughby, W. W.*, Constitutional Law of the United States, New York, 1910, §§ 669-738.

CHAPTER III.

THE POWERS OF CONGRESS.

28. **In general.**—The Constitution declares that all legislative powers therein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives. These powers are then specifically enumerated; though, as has already been pointed out, they are stated in general terms and therefore do not exclude the exercise of such powers as are incidental to or implied in those expressly enumerated.[7] In the sections here following an attempt will be made to give a brief résumé of the principal powers of the national legislature.

29. **The power of taxation.**—The Articles of Confederation gave Congress no power of taxation and the dependence of the national government upon the voluntary contributions of the states was one of the chief causes which led to the downfall of the Confederation. Article I, § 8, of the Constitution gives Congress the general power "to levy and collect taxes, duties, imposts and excises." Chief Justice Marshall, in McCulloch v. Maryland,[8] well said that "the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which

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[7] See §§ 8, 9 of this article.

[8] 4 Wheat. 316 (U. S.), Leading Illustrative Cases.

it is applicable to the utmost extent to which the government may choose to carry it." It involves, he added, the power to destroy and may therefore be employed for other purposes than the raising of revenue. Thus it was employed as a means of ridding the country of the circulating notes of state banks, to the end that a national currency might be established,[9] and has been more recently resorted to as means of discouraging if not prohibiting the manufacture of oleomargarine colored in imitation of butter, and the manufacture of phosphorus matches. This legislation has been sustained by the Supreme Court, which declined to inquire into the motives of Congress in imposing the tax.[10] It may also be employed for purposes of regulation, as where a head tax was imposed upon immigrants, the same to be paid by the owners of vessels bringing immigrants into the United States.[11] It has long been resorted to as a method of protecting home manufactures and domestic labor against foreign competition, and the constitutionality of such legislation has been so long acquiesced in that it is probably beyond the domain of controversy.

There are certain limitations, however, on the power of Congress in the exercise of the taxing power. In the first place, (Art. I., § 8, cl. 1), all duties, imposts and excises must be uniform throughout the United States, and the Supreme Court has said that a tax is uniform "when it operates with the same force and effect wherever the subject is found."[12] In the second place, (Art. I., § 9, cl. 4), all capitation and direct taxes levied by Congress must be apportioned among the states in proportion to their respective populations. Since according to the Constitution a direct tax is one only which may be levied in proportion to population, the constitutional and economic distinctions between direct and indirect taxes are not identical. Thus the Supreme Court has held that a tax on carriages is not a direct tax though it is so considered in political economy;[13] so as regards a tax on the receipts of insurance companies[14] and a tax on circulating bank notes.[15]

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[9] Veazie Bank v. Fenno, 8 Wall. 533 (U. S.).

[10] McCray v. United States, 195 U. S. 27.

[11] Head Money Cases, 112 U. S. 580.

In regard to income taxes, the Supreme Court at first held that they were not direct taxes in the sense of the Constitution,[16] but in the case of Pollock v. Farmers Loan and Trust Co.,[17] decided in 1895, the Supreme Court overruled its decision in the former case, that the only direct taxes in the sense of the Constitution were capitation taxes and taxes on real estate, and laid down the rule that taxes on incomes derived both from real estate and personal property are also direct taxes, and the law of 1894, levying such taxes, having made no provision for their apportionment among the states on the basis of their population, was declared to be unconstitutional. An amendment to the Constitution empowering Congress to levy taxes on incomes without the apportionment requirement was proposed by Congress in 1909 and has been ratified by the requisite number of states. It has become, therefore, a part of the Constitution.

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[12] Head Money Cases, 112 U. S. 580.

[13] Hylton v. United States, 3 Dall. 171 (U. S.).

[14] Pacific Insurance Co. v. Soule, 7 Wall. 433 (U. S.).

[15] Veazie Bank v. Fenno, 8 Wall. 533 (U. S.).

[16] Springer v. United States, 102 U. S. 586.

[17] 157 U. S. 429, and 158 U. S. 601 (rehearing).

Finally, a third limitation on the taxing power of Congress is found in the clause of the Constitution (Art. I., § 9, cl. 5), which declares that no tax or duty shall be levied on articles exported from any state. The Supreme Court has interpreted this prohibition as having reference only to exportations to foreign countries and not to the transportation of goods from one state to another.[18] The prohibition is directed only against taxes levied on the right of exportation or the act of exportation or intended exportation and not against mere property taxes levied on articles which may be exported.[19]

30. **Power to borrow money.**—The Constitution (Art. I., § 8, cl. 2) empowers Congress "to borrow money on the credit of the United States," and unlike the power of taxation and also unlike the borrowing power of the state legislatures, it is subject to no limitations whatever. In the draft of the Constitution as reported by the Committee on Detail, Congress was also authorized "to emit bills of credit," but the latter clause was stricken out, whether for the purpose of intentionally depriving Congress of such power or whether on the ground that the authority was implied in the power to borrow and therefore an express grant was unnecessary, there has been much

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[18] Woodruff v. Parham, 8 Wall. 123 (U. S.).

[19] Turpin v. Burgess, 117 U. S. 504; see TAXATION, Part V.

controversy. The question, however, did not arouse serious discussion until Congress undertook to give the legal tender quality to bills of credit by the act of February 25, 1862. This act was the subject of strong opposition, and Mr. Madison was quoted as having declared that the Convention "cut off the pretext for a paper currency and particularly for making bills a tender, either for public or private debts." Mr. George Bancroft asserted in the course of the controversy that "our Federal Constitution was designed to end forever the emission of bills of credit as legal tender in payment of debts, alike by the individual states and the United States."[20]

In the case of Hepburn v. Griswold,[21] the Supreme Court held that bills of credit could not be made a legal tender in the payment of private debts contracted before the enactment of the law providing for such paper currency, but this opinion was later overruled in the case of Knox v. Lee,[22] in which the Supreme Court by a majority of one upheld the issuance of legal tender notes as a legitimate war measure. Still later the Supreme Court went further and affirmed the right of Congress to issue notes not only as a war measure but held that they might be issued in time of peace as a result of the general and unlimited power of Congress to borrow money.[23]

31. **Regulation of commerce.**—Congress is given power by the Constitution (Art. I., §8, cl. 3) to regulate commerce with foreign nations and among

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[20] Plea for Constitution, p. 5.

[21] 8 Wall. 603 (U. S.).

[22] 12 Wall. 457 (U. S.).

[23] Juilliard v. Greenman, 110 U. S. 421, LEADING ILLUSTRATIVE CASES.

the several states and with the Indian tribes.[24] This provision has perhaps been the source of authority for a greater volume of important federal legislation than any other single clause in the Constitution. For the first one hundred years, however, the power which was thus conferred was rarely employed except in a negative way to prevent the states from interfering with commerce. The first important act of Congress for the regulation of commerce was the act of 1887 creating the Interstate Commerce Commission and prescribing certain rules in accordance with which commerce among the states should be carried on. Since that date a large number of acts have been passed and there is a considerable demand for still further legislation. This legislation deals with such matters as quarantine and medical inspection, immigration, regulating of railroad rates, adulterated foods, drugs and drinks, the inspection of vessels carrying passengers, registration of vessels, protection of seamen, use of wireless telegraphy trusts, inspection of slaughter houses, protection of migratory birds, and the like.

The only limitations on the power of Congress in respect to the regulation of commerce are that no duty may be levied on goods exported from any state, that no preference may be given by any regulation of commerce to the ports of one state over those of another, and that no vessel bound to or from one state shall be obliged to enter, clear or pay duties in another. The Supreme Court has interpreted commerce to mean not only the transportation of freight and passengers but the sending of telegraphic and telephonic messages.[25] In short, it includes not only transportation of persons and commodities of whatsoever character but intercourse and communication by any and all of the modern devices for transmitting thought. By a recent act of Congress the transportation of oil through pipes from one state to another as well as the business of express and sleeping car companies have been brought under the regulation of the federal government (act of 1906).

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[24] See for further treatment the subject, INTERSTATE COMMERCE.

The power to "regulate" has also been interpreted to include the power to "prohibit" commerce entirely. Upon this interpretation the embargo act of 1807 and the non-intercourse act of 1810 were justified and so was the act of March 2, 1893, prohibiting the transportation of lottery tickets from one state to another.[26] In pursuance of the power to regulate interstate commerce, Congress in 1890 passed the so-called Sherman anti-trust act and in 1903 the Elkins act, both designed to prohibit combinations in restraint of trade among the states. The first mentioned law has been the subject of numerous important decisions by the Supreme Court, beginning with the case of the Trans-Missouri Freight Association,[27] which held that the act applied to combinations among the railroads as well as to trusts properly speaking, and ending with the case of the Standard Oil Co. in 1911, which held that it prohibited only combinations which were in "unreasonable restraint of trade."[28] It was

[25] Pensacola Telegraph Co. v. W. U. Telegraph Co., 96 U. S. 1.

[26] Constitutionality sustained in Champion v. Ames, 188 U. S. 321.

[27] 166 U. S. 290.

[28] 221 U. S. 1.

in pursuance of this power that the Hepburn railway act was passed in 1906, giving the Interstate Commerce Commission power to determine maximum railway rates and prohibiting railroads from transporting from one state to another commodities of their own production or of which they are the owners.[29] Under this authority also Congress passed the imported pure food law and the interstate pure food law, both designed to restrict foreign and interstate commerce in unwholesome and adulterated food products; and the meat inspection laws of 1891 and 1906, providing for the inspection and regulation of slaughter houses whose products are intended for interstate commerce. Finally, it was in pursuance of this authority that the federal employers' liability law of 1906, the railway safety appliance act of 1893, the act of 1907 limiting the hours of labor employees on interstate trains and the act of 1898 providing for the arbitration of labor disputes between interstate carriers and their employees were passed.[30]

32. **Naturalization.**—The Constitution (Art. I., §8, cl. 1) authorizes Congress to pass a "uniform rule of naturalization." Thus the whole matter of granting citizenship to aliens is vested in Congress. Before 1790, when the first naturalization act was passed, the several states enacted laws prescribing the conditions under which aliens might be naturalized, thus raising the question as to the validity of such statutes. Hamilton had argued that the power of

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[29] Constitutionality sustained in United States v. Delaware and Hudson Co., 213 U. S. 366.

[30] For a more extended discussion see subject, INTERSTATE COMMERCE.

Congress to deal with the subject of naturalization "must necessarily be exclusive because if each state had power to prescribe a distinct rule, there could not be a uniform rule as required by the Constitution."[31] In 1817 the Supreme Court adopted this view, holding that the power of Congress was exclusive and that the states had no jurisdiction over the subject of naturalization.[32]

The power to naturalize has been conferred by Congress on the courts. By the act of June 29, 1906, these courts are: The United States Circuit and District Courts, the Supreme Court of the District of Columbia and all state and territorial courts of record having a seal, a clerk and a jurisdiction in actions at law or equity in which the amount in controversy is unlimited. Prior to 1906, inferior courts of limited jurisdiction were authorized to grant certificates of naturalization, but certain abuses resulting therefrom, especially in some of the large cities, led Congress to deprive them of this authority. Under the existing statutes only "white persons" and "persons of African descent" are capable of being naturalized, and Chinese persons are excluded by special laws. As interpreted, the law excludes Japanese, Burmese and Hawaiians, since they are neither "white persons" nor "persons of African descent."[33]

Polygamists, disbelievers in, or opponents of, organized government or advocates of the assassination of public officers, and members of organizations or bodies teaching such doctrines are excluded by statute. The applicant must have "behaved as a person of good moral character" and must be "attached to the principles of the Constitution and well disposed to the good order and happiness of the same."[34] At least two years before his admission the applicant must make a declaration of intention to become a citizen and renounce all allegiance to any foreign prince or state. By the recent act of 1906 he is also required to be able to read and speak the English language. A residence in the United States of five years is required, except that one year suffices for aliens who have served in the army or navy and have been honorably discharged therefrom. The naturalization of a father operates to naturalize the minor children if they are residing within the United States.[35] And if after making his declaration of intention he should die before being naturalized, his widow and children shall be considered as citizens upon taking the oaths prescribed by law. The effect of natualization is to invest the alien with all the rights of a natural born citizen except that he is not eligible to the office of President or Vice President of the United States, both of which offices are restricted by the Constitution to native born citizens. In regard to the protection of its citizens it is now the policy of the government of the United States to make no distinction between naturalized and native born citizens. The common practice of European governments of refusing to protect their naturalized citizens in the countries of their origin is not followed in the United States; a naturalized American citizen is entitled to the same protection in the land of his birth as he would be in any other country or as a native born citizen traveling abroad would be.[36]

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[31] The Federalist, No. 32. See subject, NATURALIZATION.

[32] Chirac v. Chirac, 2 Wheat. 259 (U. S.).

[33] Van Dyne, Citizenship of the United States, p. 57.

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[34] For the judicial interpretation of these requirements, see the Report on the Subject of Citizenship, Expatriation and Protection Abroad, 59th Congress, 2d Session, H. R. Doc. No. 326, pp. 115-118.

[35] Boyd v. Nebraska, 143 U. S. 135.

33. **Bankruptcy.**—Congress is authorized by the Constitution (Art. I., § 8, cl. 4) to pass uniform bankruptcy acts. In English law at the time of the formation of the Constitution a distinction between bankruptcy and insolvency was recognized. Bankruptcy was a term applied only to merchants and traders guilty of certain fraudulent acts, whereas insolvency was the condition of a debtor whose liabilities exceeded his assets. Thus while any one could become an insolvent, only merchants and traders could be declared bankrupt. In the United States, however, the Supreme Court has from the first interpreted the term "bankruptcy" to be practically synonymous in meaning with "insolvency." A bankruptcy act, therefore, is a law by which a debtor may have his property distributed among his creditors and himself discharged from further legal liability for existing contracts and obligations."[37] Congress has passed bankruptcy acts on four different occasions: 1800 (repealed in 1803); 1841 (repealed in 1843); in 1867 (repealed in 1878); and in 1898 (still in force).

The present law distinguishes between voluntary and involuntary bankruptcy. It permits any debtor (except a corporation) to become a voluntary bankrupt by filing a petition in the United States District Court. Any person except a corporation, wage earner or farmer may, upon the petition of his creditors, be declared an involuntary bankrupt for conveying, concealing or removing his property with intent to defraud his creditors and for certain other acts of similar character. The power of Congress to enact bankruptcy laws belongs to the class of concurrent powers described above, the Supreme Court having held that the power was not exclusively vested in Congress but might be exercised by the states also. However, when Congress acts its legislation suspends the operation of existing state laws on the subject, but they revive upon the repeal of the federal statute.[38] Moreover, a state bankruptcy act cannot discharge a debtor from a contract entered into prior to the enactment of the law, for that would be a violation of the provision of the Federal Constitution forbidding the states from passing laws impairing the obligation of contracts.[39] Finally, the Supreme Court has laid down the principle that state bankruptcy laws have no extraterritorial validity and they cannot have the effect of discharging a foreign debtor unless the creditor has made himself a party to the proceeding.[40]

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[36] Moore, American Diplomacy, p. 192.

[37] For further discussion of this subject, see subject, BANKRUPTCY.

34. **Power to coin money.**—Congress is authorized "to coin money and regulate the value thereof and of foreign coin" (Art. I., §8, cl. 5). This power is undoubtedly exclusive in Congress, for in another clause the Constitution expressly prohibits

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[38] Butler v. Goreley, 146 U. S. 303.

[39] Sturges v. Crowninshield, 4 Wheat. 122 (U. S.); Ogden v. Saunders, 12 Wheat. 213 (U. S.).

[40] Ogden v. Saunders, 12 Wheat. 213 (U. S.).

the states from coining money and from making anything but gold and silver coin a tender in payment of debts. The purpose of these several provisions is to place under the control of Congress the whole matter of currency, with a view to securing uniformity throughout the Union. To regulate the value of foreign coin is to prescribe the rates at which it shall be received by the government; in practice only the value of gold coin has been thus determined since it alone is considered the money of commerce. From the first it has been the practice of the government to coin free any and all gold bullion offered by its owners, but since 1873 it has not followed the policy of free coinage of silver.

Congress is also authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States." Had this power not been expressly granted it would necessarily have belonged to Congress as an incident to its power to borrow money and regulate coinage.[41] The Supreme Court has also held that Congress, in pursuance of its power to punish offenses against the law of nations, has power to provide for the punishment of the counterfeiting in the United States of the coin and securities of foreign governments,[42] or the bringing into the United States, with the intent to pass the same, of foreign or counterfeited coin. It has also been held that the power of Congress to provide for the punishment of counterfeiting, passing or uttering counterfeit coins is not exclusive and that the states may also exercise the power concurrently with Congress.[43] In the exercise of its power Congress has passed acts providing for the punishment of counterfeiting, passing or uttering the coin of the country, treasury notes, national bank notes, gold and silver certificates, United States bonds, internal revenue and postage stamps, postal money orders, custom house certificates and the securities of foreign governments.[44]

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[41] United States v. Marigold, 9 How. 560 (U. S.).

[42] United States v. Arjona, 120 U. S. 479.

35. **Weights and measures.**—Congress is also empowered (Art. I., § 8, cl. 5) to fix the standard of weights and measures with a view to securing uniformity among the states, the desirability of which was dwelt upon by President Washington in his message to the first Congress and in several reports subsequently made on the subject, notably one by the Secretary of State in 1821. But Congress has never legislated on the subject further than to legalize the metric system, thus permitting its use by the states but not making it obligatory; to furnish the states with standards; and to establish a bureau of standards in the Department of Commerce and Labor. The universal use throughout the United States of the old English standards has made federal legislation unnecessary. Should Congress see fit, however, to deal with the subject, the effect would be to suspend the operation of any existing state laws on the subject, as is the case with the national bankruptcy act.

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[43] Fox v. Ohio, 5 How. 410 (U. S.), and United States v. Marigold, 9 How. 560 (U. S.).

[44] Federal Penal Code of 1910, §§ 147-178.

36. **Post offices and post roads.**—The power is also given to Congress (Art. I., § 8, cl. 7) "to establish post offices and post roads." In the early history of the country some of the strict constructionists maintained that the power of Congress in respect to the postal service was limited simply to the designation of the roads over which the mails should be transported and the offices at which they should be received and distributed, and that it did not, therefore, include the power to transport the mails or to establish and operate the various agencies such as are now regarded as an essential part of the postal system.[45] But this narrow view of the power of Congress was not adopted. The power to establish post offices and post roads includes everything essential to a complete postal system as well as the power to protect it by penal legislation, and whatever place at which postal matter is officially kept is a post office even though it is nothing more than a desk or a trunk or a box.[46] The activities of the postal service have been multiplied and extended until, as a recent Postmaster General has observed, the postal establishment has become the greatest business concern in the world, employing more men, expending more money and affecting more interests "than any other human organization, public or private, governmental or corporate." They now embrace not merely the erection of post office buildings, the transportation of the mails and the delivery

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[45] Kent, Commentaries, vol. I, p. 268; Story, Commentaries, §§ 1128-1150.

[46] Cooley, Principles of Constitutional Law, p. 95; United States v. Marselis, 2 Blatch. 108 (U. S.).

of the same at the post offices, but free delivery at residences in all towns and cities containing a population of not less than 10,000 inhabitants, delivery at country residences on more than 40,000 rural routes, the registration and insurance of valuable letters and parcels, the sale and transportation of money orders, the receiving of deposits of money and the payment of interest on the same, the granting of subsidies to certain steamship companies for carrying the mails and, by a very recent act, the transportation of parcels not exceeding eleven pounds in weight. In pursuance of the power to regulate commerce and establish post offices and post roads, it has been held that Congress may construct, or authorize private individuals to construct, railroads across the continent.[47]

The power of Congress to determine what matter may be transported through the mails and what may be excluded is now well established. Thus Congress has enacted that lottery tickets shall not be admitted to the mails and the exclusion has been sustained by the Supreme Court as a valid exercise of legislative power.[48] Likewise it has forbidden the sending through the mails of obscene literature, prints or pictures, and of course many objects which by their nature are unsuited for transportation through postal channels. In the same way Congress has forbidden the use of the mails for fraudulent purposes and has authorized the Postmaster General to refuse to deliver such mails to persons to whom it may be addressed. It is now definitely settled that the United States government has a monopoly of the postal service and that the states may not operate a postal service in competition with that of the federal government nor may an individual send by private express letters or packets containing newspapers or pamphlets.[49]

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[47] California v. Central Pacific R. R. Co., 127 U. S. 1.

[48] Ex parte Jackson, 96 U. S. 727; in re Rapier, 143 U. S. 110, LEADING ILLUSTRATIVE CASES.

37. **Copyrights and patents.**—Congress is also authorized (Art. I., §8, cl. 8) "to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries." This power was first exercised by Congress in 1790. The copyright term was first fixed at fourteen years, but by the act of 1831 it was extended to twenty-eight years, with the privilege of renewal for twenty-eight years longer by the author, widow, widower, children or next of kin. Books, periodicals, newspapers, lectures, dramatic and musical compositions, maps, works of art, drawings, photographs and prints are some of the objects that may be copyrighted. The copyright secures to the author the exclusive right to print, publish, translate and sell the same. The law as amended in 1891 permits foreign authors to secure a copyright in the United States when the government of the country of which they are citizens grants the benefit of copyright to citizens of the United States on substantially the same basis as to its own citizens. In the case of foreign books printed in the English language, however, the type must be set in the United States. A

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[49] Federal Penal Code of 1910, §§ 180-184.

copyright is assignable provided the assignment is recorded in the office of the Librarian of Congress.

The law in relation to patents secures to inventors for a term of seventeen years the exclusive right to manufacture and sell their inventions. Patents are granted for any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, or any new or original design. But the granting of a patent does not give the patentee authority to exercise his right in a state in violation of the laws enacted in such state in pursuance of its police power.[50] The law contains provisions for the punishment of the infringement of patents, allowing the inventor to sue for damages or the remedy of injunction to restrain the infringer from manufacturing and selling the article. Patents like copyrights are assignable provided the assignment is recorded in the patent office. An act of Congress authorizing the registration of trade-marks in the patent office, and the securing to their owners the exclusive use thereof was held to be unconstitutional by the Supreme Court on the ground that a trade-mark was not necessarily an invention or discovery, and since the act was not restricted to trade-marks for use in interstate or foreign commerce, the act could not be sustained under the commerce clause of the Constitution.[51] Congress thereupon amended the law so as to restrict its application to trade-marks used in foreign and interstate commerce and these only are protected by the federal government.

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[50] Patterson v. Kentucky, 97 U. S. 501.

[51] Trade Mark Cases, 100 U. S. 82. See subjects, COPYRIGHTS, TRADE MARKS, PATENTS.

38. **Punishment of crime.**—The power of Congress to provide for the punishment of crime is derived from two sources: first, it results from its power to punish violations of its own laws; and second, it results from express grant. Under the first head may be mentioned legislation for the punishment of sedition and other crimes against the existence of the government, legislation for the punishment of offenses against the operations of the government, offenses committed by federal officials and employees, offenses committed in the territories and within the admiralty and maritime jurisdiction, offenses in connection with the administration of justice, and offenses against the operation of the postal service and offenses against interstate and foreign commerce and offenses against the revenue laws. In addition to the implied power of Congress in respect to crime, it is expressly authorized to provide for the punishment of treason, subject to the limitation that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted;[52] to punish counterfeiting (already described), to punish offenses in violation of the thirteenth, fourteenth and fifteenth amendments,[53] and to punish the offense of piracy, crimes committed on the high seas and offenses against the law of nations.[54]

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[52] Bigelow v. Forrest, 9 Wall. 339 (U. S.).

[53] See Part III, CITIZENSHIP, CIVIL RIGHTS, SUFFRAGE AND DUE PROCESS OF LAW.

[54] The criminal laws of the United States have been codified, revised and amended in pursuance of the act of March 4, 1909, and are here cited as the Federal Criminal Code of 1910.

The power of Congress to provide for the punishment of the three last mentioned classes of offenses, although expressly granted by the Constitution, might in the absence of express grant be implied from the admiralty and maritime jurisdiction or even from the general power of the government of the United States in respect to its control over foreign affairs. At the time of the formation of the Constitution, piracy had a well defined meaning at international law. Nevertheless Congress was empowered not only to "punish" but to "define" piracy. It may therefore enlarge the definition so as to include within the term other crimes than robbery or forcible depredation on the high seas, *animo furandi* (intent to steal), which is all that piracy means according to international law.[55] And this it has done. Thus it has enacted that the act of confining or detaining slaves on board a vessel, or the seizing of slaves on foreign shores is piracy,[56] though it is not such by the law of nations. Piracy as thus defined by act of Congress and also piracy as defined by the law of nations is punishable by life imprisonment, though prior to 1897 the latter was punishable by death.[57] In the case of piracy as defined by municipal law the jurisdiction of the United States applies only to American citizens or to aliens committing the offense on American vessels, and so as to robbery committed on the high seas by an alien on a foreign ship.[58]

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[55] Kent, Commentaries, vol. I, p. 183; United States v. Smith, 5 Wheat. 153 (U. S.). The Supreme Court has decided that the Great Lakes are "high seas" in the sense of a statute providing for the punishment of murder on the high seas. United States v. Rodgers, 150 U. S. 249.

[56] Federal Criminal Code of 1910, §§ 246, 247.

[57] Same, note to § 290.

In pursuance of its power to provide for the punishment of other crimes than piracy on the high seas, Congress has enacted laws providing for the punishment of such offenses as maltreatment of crews, mutiny, and inciting to mutiny, abandonment of marines in foreign ports, plundering vessels in distress, destroying vessels at sea, arming vessels to cruise against citizens of the United States, piracy under cover of a foreign commission, confederating with pirates, etc.[59] In pursuance of its power to provide for the punishment of offenses against the law of nations, Congress has enacted an elaborate act to protect the neutrality of the United States in case of war between friendly powers. This act forbids, subject to heavy penalties, the acceptance within the United States, by American citizens, of commissions to serve against a friendly power, enlisting in foreign military or naval service,[60] the fitting out or arming of vessels to be employed against a friendly power, the organizing of a military expedition to be carried on against any power with which the United States is at peace, etc.[61] Provision for the punishment of the counterfeiting or circulating in the United States of the coin and securities of foreign governments is also an example of the exercise by Congress of its power to punish offenses against the law of nations.[62]

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[58] Jones v. United States, 137 U. S. 202.

[59] Federal Criminal Code, §§ 290-310.

[60] These provisions apply only when the offense is committed within the territory of the United States and not to those who go abroad without intent to enlist. United States v. Kazinski, 2 Sprague 7 (U. S.).

[61] Federal Criminal Code, §§ 9-18.

39. **War powers of Congress.**—The Constitution (Art. I., § 10, cl. 3) entrusts the entire war power to the general government, and expressly forbids the states from keeping troops or ships of war in time of peace, or from engaging in war unless actually invaded or in imminent danger. The war power of the nation is divided by the Constitution between the executive and Congress. To the President is confided the supreme command of the army, the navy and the militia when it is called into the service of the United States; upon Congress is conferred the power: (1) to declare war; (2) to grant letters of marque and reprisal; (3) to raise and support armies, but no appropriation of money for that purpose shall be for a longer term than two years; (4) to provide and maintain a navy; (5) to make rules for the government and regulation of the land and naval forces; (6) to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; (7) to provide for organizing, arming and disciplining the militia and for governing such part of it as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress; (8) and to make rules concerning captures on land and water.

To Congress alone belongs the power to declare war, but war may in fact exist without a declaration, for the Supreme Court recognizes the distinction between war in a material sense and war in a legal sense, between a condition of insurgency and a condition of belligerency.[63] Civil war may also exist without a declaration; indeed, says the Supreme Court, "A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. As a civil war is never publicly proclaimed, *eo nomine* (under that name), against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. The true test of its existence as found in the writing of the sages of the common law may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.' "[64] In such a case it belongs to the President to recognize the existence of war as a fact and to take steps to meet it, as for example by establishing a blockade. In the case of foreign war, however, a declaration of war by Congress is necessary, though the war may in fact exist before a formal declaration is made. Thus the Mexican war and the war with Spain, both began anterior to the declaration of Congress and in the latter case the declaration was made retroactive so as to cover the period of war prior thereto.[65]

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[62] United States v. Arjona, 120 U. S. 479.

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[63] The Three Friends, 166 U. S. 1; Wilson, Insurgency and Belligerency, American Journal of International Law, vol. I, pp. 46 and following.

[64] The Prize Cases, 2 Black 665 (U. S.).

The power to grant letters of marque and reprisal might be inferred from the power to declare and prosecute war, but it is nevertheless expressly conferred on Congress, since such letters have sometimes been employed as a means of obtaining redress for national injuries without resorting to war. A letter of marque and reprisal is a commission issued by a belligerent to a private individual authorizing him to prey upon the commerce of the enemy. The bearer of such a commission is called a "privateer" and the service in which he engages is known as "privateering." The Declaration of Paris of 1856 prohibited this method of warfare, and while the government of the United States never formally became a party to the declaration, it has nevertheless observed the rule in fact. It was again forbidden by a convention of the second Hague Conference of 1907, to which practically all the governments of the world have become parties. While the President is by the Constitution made the commander-in-chief of the army, the power to create, equip and organize the army belongs exclusively to Congress. The only limitation imposed on its authority in this connection is that no appropriation for that purpose shall be made for a longer term than two years. The purpose of this restriction is to render it impossible for the President to keep up a standing army when in the judgment of Congress it is not needed. By thus limiting the appropriations it enables Congress to keep the army under its control.[66] There being no such fear that the navy might be improperly used by the President against the liberties of the people, the power of Congress to maintain a navy was not subjected to the above mentioned restriction.

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[65] The Paquete Habana, 175 U. S. 677. One of the Conventions of the second Hague Conference of 1907 imposes on belligerents the obligation of making a formal declaration before beginning hostilities.

In the United States, the army is recruited by voluntary enlistment and not by conscription, as is the practice in Europe; nevertheless, all persons capable of performing military duty may be compelled to do so by law, as was in fact done by the Draft Act during the Civil War.

The power of Congress to make rules for the government and regulation of the land and naval forces is necessarily implied in the power to maintain armies and to wage war, but it is nevertheless expressly granted by the Constitution. In pursuance of this authority Congress has enacted Articles of War for the government of the army and navy. They prescribe the obligations and duties of the enlisted men, their relations to the government and to their superior officers; they prescribe a list of prohibited offenses, provide methods of trial, penalties and modes of punishment, rules of discipline, etc. Enlisted men who violate the military laws are tried not by ordinary civil courts but by military tribunals termed "courts-martial," composed entirely of military men and presided over by military officers. The trial is not upon indictment, for the fifth amendment, which guarantees presentment by a grand jury in criminal cases, expressly excepts cases arising in the land or naval forces or in the militia when actually in the service of the United States. Likewise trial by jury is not a constitutional necessity. The verdict of a court-martial, except when a question of jurisdiction is raised, is not reviewable by the civil courts. It belongs to the President alone to review the findings of a court-martial and to approve or disapprove the same, and in exercising this power he must do so personally and not through a subordinate.[67] Sometimes certain offenses under the military law are at the same time offenses against the local civil law, in which cases the offender may be punished by either or both the military and civil authority.[68] Thus there is an opportunity here for conflicts between the military and civil authorities, but Congress has removed the danger by providing that the authority of the civil courts shall have precedence in such cases. In time of actual war, however, and especially on the theater of hostilities, the military courts have exclusive jurisdiction over all persons in the enlisted forces.

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[66] Story, Constitution, § 1188.

40. **The militia.**—As defined by Congress the militia consists of all able-bodied male citizens between the ages of eighteen and forty-five years. At the beginning of 1912 the strength of the organized militia known as the national guard was 117,988 officers and men.[69] This of course does not embrace that portion of the land militia which is unorganized

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[67] Runkle v. United States, 122 U. S. 543.

[68] Coleman v. Tennessee, 97 U. S. 509.

[69] Report of the Secretary of War for 1912, p. 20.

nor the naval militia, which aggregates some 6,000 men. The militia are state forces; it is organized and controlled by the states and is under the command of the governors of the states. It does not become a part of the national forces nor subject to the command of the President until it has been called into the service of the United States. Then it comes under the complete control of the federal authority and is subject to the Articles of War the same as the regular forces.

Congress is authorized to provide for calling forth the militia for three purposes only: to execute the laws of the Union, to suppress insurrections and to repel invasions. By the act of 1795, still in force, Congress prescribed the conditions under which the militia might be called into the service of the United States. It authorizes the President to make the call in certain contingencies, and the Supreme Court has laid down the principle that he is the sole judge of the existence of the facts upon which he is authorized to act.[70] In the exercise of his power the President may issue his call to the governors of the states or address it directly to the commanding officers of the militia.[71] The militia has in fact been called out by the President on three occasions since the adoption of the Constitution: in 1794, to suppress the so-called whisky insurrection in Pennsylvania; in 1812, to repel the British invasion, and during the Civil War, to suppress the insurrection. During the war with Spain, in 1898, the call was for volunteers rather than for the militia; nevertheless, many of those who responded were members of the organized militia.

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[70] Martin v. Mott, 12 Wheat. 19 (U. S.), LEADING ILLUSTRATIVE CASES.

[71] Houston v. Moore, 5 Wheat. 1 (U. S.).

It is to be noted that the purposes for which the militia may be called into the service of the United States are particularly specified in the Constitution. The better opinion is that it cannot be employed for any other purposes than those specified. The question as to whether the President has authority to send the militia into a foreign country has never been decided by the Supreme Court. The Attorney General, in an opinion given to the Secretary of War, under date of February 17, 1912,[72] in answer to an inquiry as to whether the militia could be called out and sent into a foreign country with the regular army as a part of an army of occupation, replied in the negative. He admitted, however, that if the militia were called out to repel invasion it would not be necessary to discontinue their use at the boundary line, but might, within certain limits, pursue and capture the invading force even beyond that line. But the power to use the militia to execute the laws has reference only to the execution of the laws of the United States or places subject to its jurisdiction, for the laws can have no extraterritorial force. Nevertheless, the act of January 21, 1903, as amended by the act of May 27, 1908, empowers the President, whenever he calls out the militia, to specify in his call the period for which such service is required, and the militia so called forth shall continue to serve during the term so specified either within or without the territory of the United States, unless sooner relieved by order of the President. The constitutionality of the provision is open to doubt.

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[72] Congressional Record, January 28, 1913, pp. 2199-2200.

41. **Military government and martial law.**—The right of the President to govern through the military arm occupied foreign territory as well as conquered domestic territory which has been in a state of insurrection has been so often exercised that it may now be considered beyond the domain of constitutional controversy. The limitations on the right of a military occupant are only such as are recognized by international law.[73] Lately the conditions constituting effectual military occupation as well as the rights and obligations of military occupants have been carefully defined by one of the conventions of the second Hague Conference (1907).[74] Ordinarily, when foreign territory is occupied by the military forces, the President takes possession and governs it through the military arm until Congress acts and provides what system of government shall be established. This was the procedure in the case of Florida, Louisiana, California and Alaska—territories acquired by treaty —and it was the procedure in the case of Porto Rico and the Philippines, acquired first by conquest, later sanctioned by treaty.

The President may displace the local civil authorities or make use of them to such extent as he deems expedient. He may retain the local courts for the trial of ordinary civil and criminal cases, or establish special military tribunals in their place, as he may deem expedient. The private law of the occupied territory remains undisturbed until superseded by the positive legislation of the conqueror.[75] Only the public law is changed without congressional action. In the case of Louisiana and Florida, the President was expressly authorized by act of Congress to take possession of the territory and govern it in such manner as he might deem proper, and in the case of Porto Rico and the Philippines he did so without the authorization of Congress, but in pursuance of his power as commander-in-chief of the army. After a period of government under the direction of the President, Congress by legislation prescribed a form of military government for the territories, which was ultimately displaced by civil government. Not only occupied foreign territory but domestic territory which has been in a state of insurrection may be the object of military government. Thus the territory of the Southern states that came under the occupation of the military forces of the United States during the Civil War was held and governed by the President through the military arm, at first without the authority of Congress and later, when the Reconstruction acts had been passed, in pursuance of its authority.[76] These acts were based on the theory that the government of conquered domestic territory belonged of right only to Congress, mainly as a result of the right and duty of the United States to guarantee a republican form of government to the states.[77]

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[73] N. O. v. N. Y. Mail S. S. Co., 20 Wall. 387 (U. S.).

[74] Convention regarding the Laws and Customs of Land Warfare. Scott's Texts of the Two Hague Conferences, pp. 225-229.

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[75] American Insurance Co. v. Canter, 1 Pet. 511 (U. S.).

[76] Dunning, Essays on the Civil War and Reconstruction, pp. 131-135.

Military government may or may not include the substitution of martial law—that is, the will of the military commander—in the place of the law of the land. Martial law is simply military authority exercised in accordance with the laws and usages of war; it is the law of necessity in the presence of war.[78] It may be applied either in domestic or foreign territory occupied by the military forces. It involves the suspension of certain constitutional guarantees in the interest of individual liberty, such as the suspension of the writ of habeas corpus, and the displacement of the civil tribunals and the trial of civil offenders by military tribunals, called "military commissions," composed of officers and enlisted men in the army.[79]

As to what authority, whether the President or Congress, is empowered to suspend these constitutional guarantees, there has been more or less controversy. The Constitution declares that the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it, and as this provision was placed in the clause of the Constitution which contains an enumeration of the powers of Congress, it was at first assumed that the power to suspend the writ belonged to that body alone.[80] When, therefore, President Lincoln suspended the writ during the Civil War, his action was widely criticized and was made the subject of a vigorous protest by Chief Justice Taney.[81] Later Congress, apparently assuming that the power of suspension lay with it alone, specifically authorized the President to suspend the writ in certain contingencies. In the famous Milligan case,[82] the Supreme Court by a bare majority vote imposed a very important limitation on the power of the federal government to suspend the constitutional guarantees in behalf of civil liberty. It held that Congress was without authority to suspend or to authorize the suspension of the writ and provide for trial by military commission of citizens in any part of the country which was not within the theater of military operations and where the civil courts were open in the unobstructed discharge of their duties.[83] Finally, it has held that the suspension of the writ does not deprive the courts of the right to issue it, but merely furnishes legal authority for the right to refuse it upon application.[84]

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[77] Texas v. White, 7 Wall, 700 (U. S.).

[78] United States v. Diekelman, 92 U. S. 520.

[79] Dunning, Essays on the Civil War, pp. 158-159.

[80] Ex parte Bollman, 4 Cranch 75 (U. S.); Story, Commentaries, § 1336.

42. **Government of the territories.**—The Constitution confers upon Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In view of this express grant of authority, there could hardly arise any question as to the power of Congress to provide for the govern-

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[81] Ex parte Merryman, Taney's Reports 246 (U. S.).

[82] 4 Wall. 2 (U. S.).

[83] For a strong criticism of the principle laid down in this case see Burgess, Political Science and Constitutional Law, vol. I, p. 251. For a defense of it see Willoughby, Principles of the Constitutional Law of the United States, p. 515.

[84] Ex parte Vallandigham, 1 Wall. 243 (U. S.).

ment of the territorial dependencies subject to its sovereignty. The only questions that have arisen relate to the power of the United States to acquire foreign territory by annexation, purchase or otherwise, and the extent of the power thus conferred. Very early in our history the Supreme Court affirmed the undoubted right of the government to acquire foreign territory either by conquest or treaty,[85] and this principle has been subsequently sanctioned in numerous cases.[86] This power has generally been derived from the war and treaty making clauses of the Constitution, but it might also be implied in the general power of the United States as a sovereign state with full control of its relations with other states.[87] An example of acquisition which can be justified only on the latter ground was the annexation of the Guano Islands by act of Congress.[88]

Concerning the extent of the power of Congress in respect to the government of the territories and dependencies, it should be observed first of all that whereas when Congress legislates for that part of the country which has been erected into states, it is an authority of delegated powers; when it deals with the territories its powers are general and residuary in character; that is to say, it may enact any legislation which it is not forbidden by the Constitution to enact. It may, therefore, establish practically any form of government for the territories that it may see fit to establish. It may establish military government or civil government, and if it establishes the latter form, it may do so subject to such limitations and exceptions as it may choose. It may allow the inhabitants a legislature of their own choosing or it may itself legislate directly for them. In case it establishes a legislative body in the territory, it may abrogate or modify at will any law enacted by such legislature. "It may," says the Supreme Court, "make a void act of the territorial legislature valid, and a valid act void; * * * it may do for the territories what the people under the Constitution of the United States may do for the states."[89] All governmental organs established in the territory, whether courts or administrative bodies, are mere agencies of the federal government, from which they derive their powers and by which they may be modified or abolished at will. It may determine the civil status of the inhabitants, grant or refuse the privileges of citizenship, extend or withhold political rights and regulate the rights of person and property.

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[85] American Insurance Co. v. Canter, 1 Pet. 511 (U. S.).

[86] Fleming v. Page, 9 How. 603 (U. S.); Stewart v. Kahn, 11 Wall. 493 (U. S.), and various others.

[87] Willoughby, Constitutional Law of the United States, p. 124.

[88] Sanctioned by the Supreme Court in the case of Jones v. United States, 137 U. S. 202.

The question whether, when foreign territory has been acquired by the United States, the Constitution, and particularly the provisions for the protection of individual rights, extend *ex proprio vigore* (by their own force) to such territory,—that is, whether, according to the language of popular usage, the Constitution "follows the flag,"—became a subject of heated controversy shortly after the acquisition of Porto Rico and the Philippines. It was asserted, on the one hand, that such parts of the Constitution as were applicable necessarily accompanied the government wherever it exercised its powers, since it had no authority except such as was derived from that instrument. On the other hand, it was maintained that the benefits of the Constitution were intended only for the people of the United States and that it belonged to Congress to extend or to withhold its provisions from the newly acquired territories. So far as the domestic territories were concerned, it had been the uniform practice of Congress to extend the provisions of the Constitution in so far as they were applicable to such territories and no distinction was made between those which were organized and those which were unorganized.[90]

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[89] National Bank v. County of Yankton, 101 U. S. 129.

When, however, Congress came to provide a government for the Philippine Islands, it refused to extend to this territory certain provisions of the Constitution for the protection of individual rights. The Supreme Court, being called upon in the famous Insular cases (1900-1901) to pass upon the question of the applicability of the Constitution to the new territories, drew, a distinction between "incorporated" and "unincorporated" territories. Territories of the latter kind it described as being only "appurtenant," constitutionally speaking, to the United States, although geographically a part of the American Empire. On the basis of this distinction the court held by a bare majority that in legislating for "unincorporated" territory Congress was not bound by the provisions of the Constitution which provide certain guarantees for the protection of personal rights.[91] This rule was affirmed in the case of Rasmussen v. The United States,[92] where the Supreme Court held that the sixth amendment was not operative in Alaska, which, although an "organized" territory, had not been incorporated into the United States. In the case of Hawaii v. Mankichi,[93] the court decided that the provisions of the Constitution relating to indictment by grand jury and trial by petit jury did not apply to the territory of Hawaii until they were formally extended thereto by act of Congress, although Justice Brown, who gave the opinion, admitted that Hawaii had been fully "incorporated" into the United States. In other words, the Constitution becomes applicable to the territories by formal extension only and not *ex proprio vigore* (by its own force) through their incorporation into the United States.

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[90] American Publishing Co. v. Fisher, 166 U. S. 464; Springville v. Thomas, 166 U. S. 707; Thompson v. Utah, 170 U. S. 347.

Regarding the citizenship of the inhabitants of the territories, the treaties by which Louisiana, Florida, Hawaii and Alaska (except the uncivilized tribes) were acquired, contained stipulations that the inhabitants of those territories should be admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and they were so admitted by acts of Congress soon after the territories were annexed to the

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[91] Downes v. Bidwell, 182 U. S. 244, LEADING ILLUSTRATIVE CASES. Same principle followed in Dorr v. United States, 195 U. S. 138.

[92] 197 U. S. 519.

[93] 190 U. S. 197.

United States. The treaty of 1898 with Spain, by which Porto Rico and the Philippine Islands were acquired, however, contained no such provisions, but instead, a stipulation to the effect that Congress should determine the civil and political status of the inhabitants. By acts of Congress for the government of these territories the inhabitants have been declared to be citizens of their respective islands, but both acts are silent as to whether they are citizens of the United States. Nevertheless, they are entitled to the protection of the government of the United States, and passports are issued to them for travel in foreign countries. Furthermore, the Supreme Court has held as to the inhabitants of Porto Rico that they are not "aliens" in the sense of the immigration laws, but it has not passed on the question as to whether they are citizens of the United States.[94]

43. **The District of Columbia.**—The Constitution (Art. I., § 8, cl. 17) empowers Congress "to exercise exclusive jurisdiction in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States." Thus the power of Congress in respect to the district is as absolute and unlimited as it is in respect to the territories. It may exercise within the district all powers of legislation that a state legislature may exercise within a state.[95] The power being "exclusively" vested in Congress, that body may not delegate it to a local or municipal council, though in

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[94] Gonzales v. Williams, 192 U. S. 1.

[95] Capital Traction Co. v. Hof, 174 U. S. 1.

fact it has delegated the powers to make regulations of a police character to the commissioners of the district. Though not a "state" within the meaning of the constitutional provision relating to suits between citizens of different states, it is a state in the sense of a treaty provision guaranteeing certain rights to aliens within the states of the Union.[96]

Congress is also given power to "exercise like authority over all places purchased by the consent of legislature in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings." Mere acquisition of ownership, however, does not of itself give the United States political jurisdiction; the latter can be obtained only with the consent of the state in which the place is situated. It seems to be established that the federal government may acquire land from the states by eminent domain as well as by purchase, but in such cases, as in the case of purchase, the political jurisdiction remains with the states, unless it is conceded to the United States.

44. **Admission of new states to the Union.**—The Constitution (Art. IV, § 3, cl. 1) provides that "new states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor shall any state be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned, as well as of Congress." It will be observed that the language is permissive, not mandatory, and no attempt is made to prescribe

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[96] Geofroy v. Riggs, 133 U. S. 258.

the conditions which the territory shall satisfy before being admitted. Thus the whole matter is left to the discretion of Congress. In 1780, when the states that claimed Western lands were being urged to cede them to the United States, Congress promised that the "lands so ceded should be disposed of for the common benefit of the United States and be settled and formed into distinct republican states, to be admitted to the Union on an equal footing with the original states," and the treaties by which Louisiana and Florida were purchased contained stipulations that the inhabitants thereof should be incorporated into the Union as soon as possible, according to the principles of the Federal Constitution.

It is clear, therefore, that at the time of the formation of the Constitution the opinion was generally held that all territory not under state organization was ultimately to be organized into states and admitted into the Union on a footing of equality with the original states. At the same time, there was a feeling that the new and sparsely settled territories should be put through a stage of pupilage and preparation before being admitted to the benefits of state organization and that during this period they should be governed under the direction of Congress. In practice there has been no fixed rule as to the number of inhabitants that a territory shall possess before being admitted, except that a minimum of 60,000 was prescribed in the Ordinance of 1787 as a condition of admission in the case of the states organized out of the Northwest Territory. California was admitted without being required to go through the territorial stage of preparation, and Nevada was admitted while its population was still less than 30,000. On the other hand, Arizona and New Mexico were held as territories for sixty years before being admitted. No states have been formed by the junction of two or more states or parts of states. Four have been erected within the jurisdiction of other states: Vermont, within the jurisdiction of New York; Kentucky, within the jurisdiction of Virginia; Maine, within the jurisdiction of Massachusetts; and West Virginia, within the jurisdiction of Virginia. The erection of West Virginia into a state was somewhat irregular, since the consent of the legislature of Virginia was never in fact obtained. The consent given was that of the legislature of the territory which was seeking to become a state, not that of Virginia; but Congress recognized the legislature of West Virginia as the legal legislature of Virginia instead of the old legislature, which was in rebellion. The whole proceeding can be justified only on the theory that Virginia having engaged in rebellion it could no longer be regarded as a state and therefore Congress was free to organize the loyal population into a new state without being under the necessity of respecting the constitutional rights of the old state.[97]

The Constitution is wholly silent concerning the mode of admission. In practice, new states have been admitted according to two different methods of procedure. When the first mode is employed,—and this is the one that has usually been followed,—the inhabitants of the territory desiring to become a state send a memorial to Congress praying for admission to the Union. If, in the opinion of Congress, the petition should be granted, an enabling act is passed authorizing the election of delegates to a convention empowered to frame a constitution. According to the second mode of procedure, the convention is assembled without the authority of an enabling act, a constitution is framed and a petition is sent to Congress requesting or demanding the admission of the state to the Union.[98] In both cases the final act of admission comes from Congress. If it approves the constitution, it either passes an act formally admitting the state to the Union on a footing of equality with the original states, or, as is sometimes the case, it authorizes the President to admit the state by proclamation when he shall have become satisfied that all the conditions have been complied with. The question as to whether the new state is a creation of Congress or of the people of the territory, has been a subject of some controversy. The states' rights school has generally supported the latter view, but the former seems more nearly in harmony with the Constitution, and the preponderance of opinion among the authorities has been in favor of this view. It is also the view sanctioned by the Supreme Court of the United States.[99]

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[97] Compare Burgess, Civil War and the Constitution, vol. II, p. 232.

The question also as to the right of Congress to impose conditions upon a state before admitting it to the Union was a subject of controversy in the early history of the Union. The question first arose in connection with the attempt of Congress to impose certain restrictions upon Missouri as a condition of admission. It was argued in favor of the right of restriction that it was not obligatory on Congress to admit new states and it might therefore refuse admission, and if it might refuse, it followed logically that it might admit only upon condition. Against this view it was argued that if Congress had the power to prescribe conditions, it might establish inequalities between the original states and the new ones, and thereby destroy the federal system of government, which was founded on the principle of equality of rights and powers among the states.[1]

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[98] Compare Jameson, Constitutional Conventions, §§ 187-188.

[99] Scott v. Jones, 5 How. 343 (U. S.); see also Jameson, work cited, § 207.

The practice, however, has been contrary to the latter view and as a matter of fact most of the states admitted to the Union since 1790 have been admitted upon conditions. Thus Nebraska was admitted before the adoption of the Fourteenth Amendment, subject to the condition that the state should never deny the electoral franchise to any citizens of the United States on account of race or color; Utah was admitted upon the condition that polygamous marriages should not be permitted in the state; and Oklahoma was admitted subject to the condition that the sale of liquor to Indians in that part of the state formerly embraced within the Indian Territory should be prohibited for a period of twenty-one years, and that Guthrie should continue to be the capital of the state until the year 1913. Seven of the seceding states were readmitted to the Union in 1868 upon the fundamental condition that their constitutions should never be so amended as to deprive any citizen or class of citizens of the right to vote except as a punishment for crime; three others (Virginia, Mississippi and Texas) were readmitted in 1870 subject to two further conditions—namely, that they should never pass any law excluding persons of color from holding office nor amend their constitutions so as to deprive such persons of equal educational privileges with the white race. If Congress has power to impose these conditions, and especially if it can enforce them, the theory that the states are equal in respect to rights and privileges must necessarily fall to the ground.[2] In 1911, however, the United States Supreme Court laid down the principle that there was "no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms in which the acts admitting them to the Union have been framed." An act of the legislature of Oklahoma providing for the removal of the capital of the state from Guthrie to Oklahoma City, in violation of the enabling act referred to above, was therefore held to be a constitutional act. "Has Oklahoma been admitted upon an equal footing with the original states?" said the court. "If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot."[3]

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[1] See also Burgess, The Middle Period, pp. 67-73, for a summary of the arguments on both sides.

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[2] Compare Dunning, Are the States Equal? in his Essays on the Civil War and Reconstruction.

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[3] Coyle v. Smith, 221 U. S. 559, LEADING ILLUSTRATIVE CASES.

CONSTITUTIONAL LAW

PART III

CONSTITUTIONAL GUARANTIES OF FUNDAMENTAL RIGHTS

BY

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CHAPTER I.

THE CONSTITUTION AS A BILL OF RIGHTS.

1. **Historical basis.**—When the American Colonists contemplated the formation of independent governments, they were familiar in their own experience with two types of organic instruments: First, the charters of their respective colonies in which the powers of local government were distributed among certain officers and bodies. The grants of power therein enumerated had been recognized as limiting the authority of the officers and bodies designated so that no action of legislative or executive character was valid unless it was within the scope of some power or authority conferred. Second, they had a vital interest also as former subjects of Great Britain

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in certain guaranties of individual rights and privileges which had been recognized by the unwritten constitution of Great Britain, composed in considerable part of certain documents which had come to be regarded as containing announcements of rights and privileges which that government ought not to deny to its subjects.

2. **English constitutional documents.**—Sir William Blackstone, in his commentary on the laws of England, which was published not long before the American Revolution and which attained to a large reputation in the colonies, declares that the absolute rights of Englishmen were guaranteed under the English constitution as follows: "First, by the great charter of liberties (1215), which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in Parliament by King Henry the Third, his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *Confirmatio Cartarum* (confirmation of the charters), whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed or counsel, act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think,

reckons thirty-two) from the first Edward to Henry the Fourth. Then, after a long interval, by the Petition of Right (1628), which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First, in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his Parliament, before the fatal rupture between them; and by the many salutary laws, particularly the Habeas Corpus Act (1679), passed under Charles the Second. To these succeeded the Bill of Rights, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th day of February, 1688; and afterwards enacted in Parliament, when they became king and queen, which declaration concludes in these remarkable words, 'and they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties.' And the Act of Parliament itself recognizes all and singular the rights and liberties asserted and claimed in the said declaration to be the 'true, ancient, and indubitable rights of the people of this kingdom.' "[1]

3. **Magna Charta.**—The constitutional document of greatest importance in English history and the one to which most frequent reference is made in discussing the constitutional law of America is Magna Charta, above referred to, which Blackstone further describes as not only redressing many grievances incident to feudal tenures, but as protecting "the subject against other oppressions, when frequently aris-

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[1] 1 Blackstone, Commentaries, p. 127.

ing from unreasonable amercements, from illegal distresses or other process for debts or services due to the crown, and from tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures, gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly (which alone would have merited the title that it bears, of the Great Charter), it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[2]

4. **State bills of rights.**—The state constitutions adopted about the time of the Declaration of Independence were, therefore, two-fold in character; they provided for organized governments and they also contained declarations of fundamental rights which the governments thus organized should not infringe. These declarations of rights constitute limitations on the powers of the governments thus provided for. Sometimes these limitations are collected in a separate portion of the state constitution specifically denominated a bill of rights; and that is the term which has come to be commonly used in state constitutions to designate the enumeration of the rights of the people which the governments provided for therein must not abridge. Some such collection of these substantial guaranties is found in each of the state constitutions. Some of these guaranties are borrowed in substance from documents of the English constitution above referred to; for instance, the provisions

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[2] 4 Blackstone, Commentaries, p. 423.

that no person shall be seized or imprisoned or deprived of his property "unless by the lawful judgment of his peers or by the law of the land,"[3] and that "excessive bail ought not to be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."[4] Many other guaranties found in state constitutions are in substance derived from the general principles of the unwritten constitution and the common law of England; such as that all men are by nature free and equal and have certain inalienable rights, among which are those of enjoying and defending life and liberty and acquiring, possessing, and protecting property; that by way of protection of life, liberty, and property against the arbitrary action of the government, bills of attainder and ex post facto laws are prohibited, the right to trial by jury is preserved, private property is not to be taken for public use without compensation, and no person is to be twice put in jeopardy for the same offense. These are only a few of the enumerations of principles of justice which manifestly should be recognized in legislation and in the administration of the law.[5]

5. **Federal Bill of Rights.**—The federal government provided for in the Articles of Confederation, immediately after the achievement of independence by the colonies, was one of very limited powers, and no bill of rights was regarded as necessary, the protection of the individual citizen being secured by the state constitutions; but when the Federal Constitution was proposed for adoption by the people of all

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[3] Magna Charta, § 39.

[4] Declaration of Rights (1689), § 10.

[5] Cooley, Constitutional Limitations (7th ed.), p. 62.

the states, conferring much larger powers upon the government provided for therein, the question was raised whether it should not contain a bill of rights. It did, in fact, guarantee some rights, such as that the writ of habeas corpus should not be suspended and that no bill of attainder or ex post facto law should be passed,[6] and it prohibited the impairment of certain other individual rights by the states.[7] But the anxiety lest the federal government should in its action infringe upon the rights and privileges which in the state constitutions had been carefully preserved led to the adoption at once of the first ten of the amendments to the Federal Constitution, which, together, are a substantial equivalent of the bills of rights found in the various state constitutions.

6. **Limitation only on federal government.**—The circumstances under which the first ten amendments to the Federal Constitution were adopted, as well as the form in which the guaranties therein contained are expressed, make it clear that those guaranties relate only to the exercise of power by the federal government. It was never supposed that in adopting these amendments, the bills of rights in the various state constitutions were being superseded or that restrictions were being imposed on the states. The manifest purpose was to limit the power of the federal government provided for by the Constitution itself. Therefore, the Supreme Court of the United States has uniformly held the provisions of the federal Bill of Rights, such as that private property shall not be

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[6] U. S. Const., Art. I, § 9.

[7] U. S. Const., Art. I, § 10, and Art. IV, §§ 1, 2.

taken for public use without just compensation;[8] that no person shall be put on trial for an infamous crime except on indictment of a grand jury, nor compelled in any criminal case to be a witness against himself, nor tried in a criminal prosecution without a jury; and that in suits at law where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, are limitations only applicable to federal legislation. The limitations on the state governments as to these matters are to be looked for in the constitutions of the respective states.

7. **Federal guaranties as against state legislation.** —Prior to 1865, the constitutions of the states were, therefore, regarded as furnishing sufficient general guaranties for individual and political rights; but as a result of the Civil War, it was thought necessary that in some respects the powers of the state governments should be restricted for the protection of persons of the negro race who had been liberated from slavery and had become entitled to the privileges not only of persons but also of citizens; and three amendments were adopted: first, prohibiting slavery or involuntary servitude "within the United States or any place subject to their jurisdiction";[9] second, declaring the rights of citizenship and prohibiting to the states the making or enforcement of any law abridging the privileges or immunities of citizens of the United States, or the deprivation by any state as to any person, of life, liberty, or property, without due process of law, or the denial to any person within

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[8] Barron v. Baltimore, 7 Pet. 243 (U. S.), LEADING ILLUSTRATIVE CASES.

[9] U. S. Const., Amend. XIII.

its jurisdiction of the equal protection of the laws;[10] and third, declaring that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.[11] While the important occasion for the adoption of these amendments was no doubt the protection of members of the negro race, their effect was to prohibit as against the states the infringement of the civil and political rights of all citizens of the United States, irrespective of color, and, to some extent, of all persons within the jurisdiction of the United States; and they indicate a new conception of federal power, and federal privileges to individuals, which the government of the United States is required to secure as against the action of the states. In these respects, rights of persons are no longer entirely dependent for protection on state constitutions.

8. **Privileges and immunities of federal citizenship.**—The new theory of federal sovereignty embodied in the Fourteenth Amendment involved, first, a guaranty of privileges and immunities of citizens of the United States as against any exercise of power on the part of the states; and second, a guaranty of due process of law and the equal protection of the laws as to all persons, without regard to citizenship. The guaranty as to due process of law and equal protection will be more fully considered hereafter.[12] The guaranty as to privileges and immunities of citizens requires some further explanation at this point, for

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[10] U. S. Const., Amend. XIV.

[11] U. S. Const., Amend. XV.

[12] See §§ 85-116.

the reason that the federal guaranty as against state action relates to privileges and immunities of citizens of the United States as distinguished from the privileges and immunities which are guaranteed to the citizens of the several states by the provisions of state constitutions. In the Federal Constitution as originally adopted was a provision that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states";[13] and in applying this provision a Justice of the Supreme Court of the United States gave this exposition, which has often been quoted:

"The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'"[14]

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[13] Art. IV, § 2.

But the privileges and immunities of the citizens of the United States referred to in the Fourteenth Amendment do not include all the privileges and immunities which the states are prohibited from denying to citizens of other states. There is a manifest distinction between the incidents of citizenship in the state and the incidents of citizenship in the United States. "The line of distinction between the privileges and immunities of citizens of the several states must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of the respective governments. A citizen of the United States, as such, has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from state to state, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws."[15]

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[14] Corfield v. Coryell, 4 Wash. C. C. 371 (U. S.).

By way of illustration of the privileges and immunities incident to federal citizens it has been held that a citizen of the United States is entitled to protection as against any action of the state in his rights "to come to the seat of government to assert any claim he may have upon that government; to transact any business he may have with it; to seek its protection; to share its offices; to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted; to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states."[16]

Another privilege of a citizen of the United States "is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. The right to peaceably assemble and petition for a redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is, that a citizen of the United States can, of his own volition, become a citizen of any state by a bona fide residence therein."[17]

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[15] Cooley, Constitutional Law (3rd ed.), p. 246.

[16] Crandall v. Nevada, 6 Wall. 35 (U. S.).

"Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship. * * * Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. And such a right or privilege is abridged whenever the state law interferes with any legitimate operation of the federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the Federal Constitution or laws."[18]

9. **State guaranties not superseded.**—It is evident, therefore, that the fundamental rights of life, liberty, and property, and their protection, are rights of state citizenship and not of federal citizenship;

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[17] Slaughter-house Cases, 16 Wall. 36 (U. S.).

[18] Cooley, Constitutional Law (3rd ed.), p. 246.

and it was not the purpose of the guaranty of privileges and immunities in the Fourteenth Amendment to place these rights primarily under the protection of the federal government except so far as the provision in that amendment in reference to due process of law and the equal protection of the laws may have that effect. "That the prime reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to every one, white or black, that comes within its provisions. But, as said in the Slaughter-house Cases, the protection of the citizen in his rights as a citizen still remains with the state. This principle is again announced in the decision in United States v. Cruikshank,[19] wherein it is said that sovereignty, for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase 'privileges and immunities' of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the Slaughter-house Cases and United States v. Cruikshank are all wrong, and should be overruled."[20]

10. **Further as to federal privileges and immunities.**—After the adoption of the Fourteenth Amendment, it was strenuously contended that all the guaranties found in the first eight amendments to the

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[19] 92 U. S. 542.

[20] Maxwell v. Dow, 176 U. S. 581, at p. 592.

Federal Constitution[21] became guaranties of privileges and immunities of citizens of the United States as against state abridgment; that is to say, it was contended that after the adoption of the Fourteenth Amendment the state could not abolish grand juries or provide for trial in civil or criminal cases without a jury, and that practically all the guaranties of civil rights in those amendments which were at first only limitations upon federal power became by virtue of that amendment federal limitations upon state power. But this contention was not supported by the Supreme Court of the United States. On the contrary, it announced the conclusion that "the Fourteenth Amendment did not forbid the states to abridge the personal rights enumerated in the first eight amendments, because those rights were not within the meaning of the clause 'privileges and immunities of the citizens of the United States.' "[22]

11. **Federal guaranties as affecting the inhabitants of territorial possessions.**—In providing for the government of territories under the clause in the Constitution authorizing Congress "to make all needful rules and regulations respecting the territories or other property belonging to the United States,"[23] territorial governments were from time to time instituted in contemplation of the ultimate admission of such territories as states, and in such cases it was assumed that the provisions of the federal Bill of Rights were applicable to the exercise of power in such territories, under the authority of the United

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[21] See § 6.

[22] Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14.

[23] U. S. Const., Art. IV, § 3.

States. When considerable areas of territory came to be acquired by treaty, the rights of the inhabitants of such territory were usually, to some extent at least, determined by the provisions of the treaty itself as made in each case. But when, as the result of the war with Spain, Porto Rico and the Philippine Islands were acquired by the United States, the provision of the treaty was that the civil rights and political status of the native inhabitants of such territories were to be determined by Congress, the question arose whether the express guaranties of the first eight amendments were restrictions upon the power of Congress to legislate with reference to the inhabitants of such territories. A similar question had, indeed, arisen under the treaty for the annexation of the Hawaiian Islands as a part of the territory of the United States; and it was finally decided in each of these instances that the power of Congress to legislate with reference to a territory over which the government of the United States was extended by treaty, without incorporation of such territory into the United States as an integral part thereof, was not subject to the limitations of such amendments; with the result that such provisions of the amendments as related to forms of procedure, were not applicable to such legislation, and Congress might preserve in such territories the methods of trial there previously existing, although they did not conform to those generally recognized among the people of the United States as originally contemplated, for whom guaranties as to such methods of procedure had been adopted.[24] As the native inhabitants of such territories did not become citizens of the United States by annexation alone, without further action of Congress, they are not entitled, as a constitutional right, to the enjoyment of such privileges.

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[24] Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

POLITICAL PRIVILEGES AND THEIR PROTECTION.

12. **Citizenship.**—The Constitution of the United States as originally adopted recognized citizenship of the United States and citizenship of the several states as an existing fact, but contained no definition of either condition. No doubt it was assumed that citizens of the various states were also citizens of the United States, and that the definition of citizenship was to be determined by the statutes of the states, or by the common law in the absence of statutes.[25]

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[25] "In the usage of English-speaking people, the word 'citizen,' in the sense of membership of the state, is quite modern. 'The term citizen,' said Mr. Justice Daniel, in a dissenting opinion in Rundle v. Delaware Canal Co., 14 Howard, 80, 97 (1852), 'will be found rarely occurring in the writers of English law.' The word is, indeed, familiar enough in our older reports, law-books, and general literature as designating the member of a borough. * * * The proper English meaning of the term 'citizen' imported membership of a borough or local municipal corporation. The usual word for a man's political relation to the monarch of the state was 'subject.' In France, the corresponding phrase *citoyen, concitoyen*, seems to have long been familiar, in the modern sense of the word 'citizen.' The word 'citizen' is not found in any of our state constitutions before that of Massachusetts (1780); and it was not in the rejected Massachusetts Constitution of 1778. In the Declaration of Independence (1776), we read it once: 'He has constrained our fellow-citizens,' etc., and once in the Articles of Confederation (1781). In the treaty with France of 1778, the usual phrase is 'subjects' 'people,' or 'inhabitants'; but 'citizen' does not occur as applicable to the United States. In the treaty with Great Britain of 1782, it is used in a marked way: 'There shall be a * * * peace between his British majesty and the said states, and between the subjects of the one and the citizens of the other.' In the Massachusetts Constitution (1780) the word occurs, but more sparingly than would be expected in a similar document now. In the Federal Constitution, prepared in 1787, it is freely used. It seems, then, to have been the events which happened in this country in the eighth and ninth decades of the last [eighteenth] century which first brought the word

13. **By birth or naturalization.**—By the common law of England, those born within the territorial limits of Great Britain were subjects of Great Britain, with perhaps only two exceptions: children born within its limits to the ambassadors or public ministers of foreign governments; and children born within such territorial limits to those who were public enemies in time of war and who were within the limits of the British Dominion on account of hostile military operations. In some other countries, the nationality of the parent was the controlling consideration in determining the citizenship of the child. These two conflicting tests, first, birth within the jurisdiction, and second, birth to parents who were themselves citizens and from whom a child derived a nationality, as it were, by inheritance, have both had their influence in the definition of citizenship in the United States. Aside from specific constitutional provisions, it is well settled that citizenship in a state or in the United States may be determined by legislation, and, in the case of the United States, by treaty. Therefore, citizenship may depend, first, upon birth; second, upon naturalization according to statutory provisions on the subject; and, third, upon naturalization by special provisions relating to classes of persons upon whom citizenship is conferred by statutes or by treaty.

It is evident that citizenship is different from resi-

'citizen,' in our modern sense of it, into familiar English speech. See Minor v. Happersett, 21 Wall. 162, 166. For interesting indications of a certain perplexity felt in Europe, in 1784, as to our understanding of the term, see 8 Works of John Adams, 213.'' Thayer, Cases on Constitutional Law, note on p. 459.

dence or domicile, for a person may be a lawful resident of or domiciled in the United States, although he is an alien. It is evident also that citizenship does not, in itself, involve the exercise of political privileges such as those of voting or holding office, for political privileges are conferred in accordance with considerations of public policy and are denied to infants on account of their immaturity, to insane persons and those who are under conviction for serious crimes on account of their incapacity or unfitness, and still, in many states, to women, although they may be recognized as having the same civil rights as men.[26]

14. **Federal citizenship.**—In 1866, Congress for the first time attempted to define citizenship of the United States,[27] and in 1868, the Fourteenth Amendment to the Federal Constitution was adopted, containing substantially the same definition by declaring that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[28] This declaration embodies the general rule of the English common law that citizenship is determined by birth within the territorial limits, without regard to nationality of parents.[29] The limitation to persons who are subject to the jurisdiction of the United States is intended to exclude children of foreign ambassadors and public ministers and also Indians who are subjects of their respective tribes.

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[26] See as to the rights of suffrage, §§ 30-33.

[27] Civil Rights Act, April 9, 1866 (Rev. Stats., § 1992).

[28] Amend. XIV, § 1.

[29] Minor v. Happersett, 21 Wall. 162 (U. S.), Leading Illustrative Cases.

The definition also includes, by reasonable construction, children born abroad whose fathers are ambassadors or public ministers of the United States, and also children born on American ships on the high seas, whose fathers are citizens; for it is recognized by international law that the residence of an ambassador or public minister abroad is, for purposes of jurisdiction, a part of the territory of the United States, and that American ships on the high seas are likewise a part of such territory. But the constitutional declaration does not exclude the power of Congress to legislate on the subject for the purpose of conferring citizenship on classes of persons not coming strictly within the constitutional provision,[30] and it is provided by statute that children born out of the limits and jurisdiction of the United States, whose fathers are at the time of the birth of such children citizens, and have previously resided in the United States, are citizens by virtue of such birth, and that a woman who might herself become a citizen by naturalization acquires citizenship by virtue of being the wife of a citizen. But a right of election is recognized on the part of children born within the United States to aliens and children born beyond the limits of the United States to citizens, to determine for themselves their citizenship, with the result that a child born within the United States to alien parents and going abroad before reaching years of discretion, and remaining abroad, may thus renounce his potential citizenship; while children of citizens born abroad, by electing to become citizens of a foreign country, may fail to avail themselves of the privilege of being citizens of the United States by birth. So a woman who has acquired citizenship in this country or a foreign country by virtue of marriage may elect, on termination of the marital relation, to retain the citizenship thus acquired, or resume her former citizenship.[81]

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[30] Rev. Stats., §§ 1992-1998.

15. **Same subject—Illustration.**—The scope and effect of the constitutional and legislative definition of federal citizenship was discussed by the Supreme Court of the United States in a case[82] decided in 1898, and in that case it is held that a child born to Chinese parents, permanently residing in the United States, is a citizen of the United States, although the parents remained subjects of the Emperor of China, and under existing laws could not have become citizens of the United States, had they desired to do so; with the result that such child, subsequently going abroad for a temporary purpose, was entitled to return into the United States notwithstanding the Chinese Exclusion Act. The validity and effect of the statutory provisions relating to children of citizens of the United States born abroad seem not to have been definitely passed upon by the Supreme Court of the United States; but the State Department has consistently recognized citizenship in such cases, subject to the right of election on the part of the child so born to adopt the citizenship of his place of birth by remaining subject to that jurisdiction until after the time of arriving at full age. Until such election is made, or the child is brought into the United States,

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[81] Act of March 2, 1907, 34 Stats. at Large, pp. 1228-9.

[82] United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, Leading Illustrative Cases.

he remains subject to at least a temporary allegiance to the country in which he was born and resides.

16. **Same subject—Further illustration.**—Correlative to the right of a citizen to come into and remain in the United States is the right of the federal government to exclude such classes of aliens as are undesirable on grounds of public policy. Many such provisions are found in the immigration laws and the treaties and statutes for the exclusion of certain classes of Chinese subjects. Indeed, the power to determine the political status of aliens has been so far extended as to justify the expulsion from the United States of certain classes of aliens,[33] and a statutory provision making the action of the administrative department of the government conclusive as to whether a person insisting upon the right to come into the country as a citizen on the question of citizenship in fact has been sustained.[34] To thus make the decision of the administrative department conclusive, is not denying the right of citizenship without due process of law.

17. **State citizenship.**—Prior to the adoption of the Fourteenth Amendment, which, by the language already quoted, declares that citizens of the United States are also citizens of the state wherein they reside, there was no federal declaration as to state citizenship. Each state determined for itself who were entitled to the privileges of such citizenship, and no doubt the states may still confer some of the usual privileges of citizenship upon persons who are not

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[33] Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016.

[34] United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, LEADING ILLUSTRATIVE CASES. And see § 108.

citizens of the state under the Fourteenth Amendment. In some states, the political privileges of voting and holding office have been conferred on resident aliens who have declared their intention to become citizens of the United States, but have not yet completed their naturalization.

18. **Citizenship in the territorial possessions.**—Citizenship was not expressly conferred upon the inhabitants of Porto Rico and the Philippines when they were acquired by the United States by treaty with Spain. The civil rights and political status of the native inhabitants of such territories were left to be determined by Congress.[35] It has been decided, however, that such inhabitants are not aliens.[36]

19. **Citizenship of Indians.**—Although members of the Indian tribes are born within the territorial limits of the United States, they are excluded from citizenship by the clause of the Fourteenth Amendment above referred to. Indian tribes are recognized as independent sovereignties with which treaties may be made, although they are under the protection and tutelage of the United States, and their members may be subject, to some extent at least, to the laws of the United States.[37] But persons of the Indian race may, no doubt, so far have lost allegiance to any tribal government as to be in the same situation as other aliens residing within the limits of the United States, so that their children are citizens by birth,

[35] Congress has recently defined and provided for the acquisition of citizenship of the Philippine Islands and declared that such citizens are entitled to the protection of the United States. Act of March 23, 1912.

[36] Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177.

[37] Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41; United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109.

for they may not be excluded from citizenship by reason of race or color. And by statutory provisions referred to in § 29, even members of Indian tribes may be citizens by general statutory provisions, although they may not become citizens by the ordinary process of naturalization.

20. **Citizenship of corporations.**—The term citizen applies only to natural persons and does not include corporations, called artificial persons, possessing only the rights granted to them by their charters. In determining whether a controversy between a natural person and a corporation is one between citizens of different states in such sense as to give the federal courts jurisdiction over it, the courts hold that the corporation must be deemed a citizen of the state of its creation;[38] but this is on the theory that the corporation consists of natural persons who are conclusively presumed to be citizens of the state of incorporation. Private corporations are not, however, citizens within the constitutional guaranties of the privileges and immunities of citizenship, although, like natural persons, they are entitled to protection under the guaranties of due process of law and equal protection of the laws.[39] As to public corporations and quasi-public corporations, it is evident that no question of citizenship can arise, for they are in fact only branches of the state vested with certain restricted governmental powers.

21. **Naturalization.**—It has been from the first a theory of the American system of government that

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[38] See subject, COURTS.

[39] See § 63.

expatriation is a natural right and that therefore the subjects of other governments coming within the limits of the United States, with the intent of permanently residing therein, may acquire citizenship in the United States and the state of such residence, and absolve themselves from further allegiance to the country from which they may have come. Accordingly, it is provided in the Federal Constitution that Congress has power "to establish an uniform rule of naturalization,"[40] in accordance with which subjects of other countries may become citizens of the United States.

At the time of American independence, Great Britain did not recognize any right of expatriation on the part of its subjects, and one of the causes leading to the war of 1812 was the assertion on the part of Great Britain of the right to impress into naval service persons who, formerly British subjects, had become American citizens by naturalization. But all civilized countries now acquiesce in the right of subjects who have gone abroad into another country, to acquire citizenship in the latter and renounce their former allegiance. This right of foreign subjects to become American citizens by expatriation and naturalization was definitely formulated by Congress in a statute passed in 1868[41] and treaties with foreign countries usually provide for such change of citizenship. It is evident that the method of naturalization provided for by Congress excludes similar legislation on the part of the states, for if the states could legislate upon the subject, the law would not be uniform.

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[40] U. S. Const., Art. I, § 8, par. 4.

[41] See Rev. Stats., § 1999. The right of expatriation has lately been definitely conceded as to American citizens. Act of March 2, 1907, 34 Stats. at Large, p. 1228.

22. **Method.**—Various statutory provisions as to the method of naturalization, some of them enacted soon after the adoption of the Federal Constitution, were collected in §§2165-2174 of the Revised Statutes of the United States, published in 1873. But by a recent statute,[42] many of the previous statutory provisions have been repealed and a new system of naturalization has been inaugurated. By this statute, a "Bureau of Immigration and Naturalization" is provided for in the Department of Commerce and Labor, having charge of all matters concerning the naturalization of aliens, to which information is to be furnished as to the applications for naturalization and the granting of certificates. The district attorneys of the United States may, in the discharge of their duty, in proper cases, resist the application in behalf of the United States or institute proceedings for the cancellation of certificates which have been improperly granted.

23. **Same subject—Steps required.**—The applicant for naturalization must have resided in the United States for the continued term of five years next preceding his application; and at least two years prior to such application, and after he has reached the age of eighteen years, he must have made a declaration on oath, before the clerk of any court authorized to naturalize aliens, or his authorized deputy, and in the district in which he resides, that it is his

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[42] Act of June 29, 1906, 34 Stats. at Large, p. 596; amended in some respects by Act of June 25, 1910, 36 Stats. at Large, p. 829. See Part VI.

bona fide intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to any foreign prince, potentate, state, or sovereignty of which he may be, at the time, a citizen or subject, setting forth in such declaration various matters of personal description and the date of his arrival in the United States, as required by the statute. Within seven years, and not sooner than two years, after making such declaration, he must apply by verified petition in writing, stating facts as to his name, residence, occupation, date, and place of birth, the place from which he emigrated, and the date and place of his arrival in the United States, in the same general manner as in his preceding declaration, and the time, place, and name of court of such previous declaration; also whether or not he is married, and if he has children, their names and the dates and places of their birth and residence.

This petition must also set forth that the applicant is not a disbeliever in or opposed to organized government, or a member of and affiliated with any organization or body of persons teaching disbelief in or opposition to organized government, or a polygamist or a believer in the practice of polygamy, and also state that the intention of the applicant is to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, etc., as required in the declaration, and that it is his intention to reside permanently within the United States; and other matters material to his naturalization which are required to be proved upon such application. This application must be verified by at least two credible witnesses who are citizens of the United States, and who state in their affidavits that they have personal knowledge of the residence of the applicant within the United States for at least five years continuously, and of the state, territory, or district in which the application is made, for a period of at least one year immediately preceding the filing of such petition, and also that they have personal knowledge that the petitioner is a person of good moral character and in every way qualified in their opinion to be admitted as a citizen.

In connection with this petition, there must be filed with the clerk of the court to which the application is made a certificate from the Department of Commerce and Labor, setting out the place and manner of the applicant's arrival in the United States and his previous declaration of intention. The court in which this petition is filed must be a court of the United States or a state court of record having a seal, a clerk, and general jurisdiction, or a court of some territory or of the District of Columbia, all being particularly described in the statute, and the application must be made to some such court within the district in which the applicant then resides.

The court to which the application is made must then proceed, after proper notice is given, with a hearing at which evidence may be introduced supporting or controverting the statements of the petition, and the applicant must declare on oath that he will support the Constitution of the United States and that he renounces allegiance and fidelity to any foreign prince, etc., as already stated in his declaration and application, and that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same; and in case he has borne any hereditary title or has been of any of the orders of nobility in the kingdom or state from which he came, he must make an express renunciation of his title or order of nobility, which must be recorded. The court may then, on finding that the applicant is entitled to be naturalized, grant such application; but the application shall not be granted, nor any certificate thereof issued, within thirty days preceding the holding of any general election.

24. **Other conditions.**—In addition to the qualifications required to be shown in the declaration and application, it is provided that no one who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, specifically or generally, of the government of the United States or of any other organized government, because of his or their official character, shall be naturalized; also, that no one shall be naturalized who cannot speak the English language, with certain exceptions declared in the statute. Naturalization is also denied to alien enemies.

25. **Declarations previously made.**—In order that the new statute shall not exclude those who in good faith are relying on a preliminary declaration made before that statute took effect, it is provided that such declarations which were in accordance with the statu-

tory provisions in force when they were made, shall be recognized as sufficient.

26. **White persons.**—Although the new statute contains no specifications or qualifications as to the race of the applicant, previous statutory provisions that limited naturalization to aliens who are free white persons and aliens of African nativity and persons of African descent,[43] and specifically providing that no court shall admit Chinese to citizenship,[44] remain unrepealed. Under these provisions, unless the applicant is of African nativity or of African descent, he must, therefore, be a free white person; and the courts have held that Chinese, Japanese, native Hawaiians, and American Indians are excluded from naturalization, while Mexicans, Armenians, and Syrians are within the description of the Caucasian or white race.[45] But these decisions are not by the United States Supreme Court, and cannot be looked upon as conclusive.

27. **Married women and minor children.**—The naturalization of the parent effects also the naturalization of his children under the age of twenty-one years who are dwelling in the United States at the time;[46] and, as already indicated in the section relating to citizenship, the wife of one who becomes naturalized is from that fact alone a citizen, provided she is a person capable of naturalization. It is also

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[43] Rev. Stats., § 2169 as amended by Act of February 18, 1875, 18 Stats. at Large, p. 318.

[44] Act of May 6, 1882, 22 Stats. at Large, p. 61.

[45] As illustrating the application in this connection of the words "white person," see In re Rodriguez, 81 Fed. 337; In re Halladjian, 174 Fed. 834; United States v. Balsara, 180 Fed. 694.

[46] Rev. Stats., § 2172.

provided that if one who has declared his intention to become a citizen dies before his actual naturalization, his widow and minor children may, by complying with the other provisions of the statute, be naturalized without making any declaration of intention.

28. **Military service.**—The statutes above referred to contain special provisions as to the naturalization of aliens who have served in the army, navy, or marine corps of the United States and have been honorably discharged.

29. **Indians.**—In connection with provisions for allotment of lands in severalty to members of Indian tribes, it is declared by statute that upon the completion of such allotments and the patenting of the lands thereunder, each member of the band or tribe of Indians to whom allotments have been made shall be a citizen of the United States and subject to the laws, both civil and criminal, of the state or territory in which he may reside; and the same declaration is made with reference to any Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe and has adopted the habits of civilized life.[47] By receiving allotment of and patent for land which entitles the Indian to citizenship, he ceases to be a ward of the government and becomes a citizen of the United States and of the state in which he resides, and as such is beyond the reach of Indian police regulations prescribed by the

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[47] Act of February 8, 1887, chap. 119, § 6, 24 Stats. at Large, p. 390, as amended by Act of May 8, 1906, chap. 2348, 34 Stats. at Large, p. 182. As early as 1865, there was provision for Indians of certain tribes becoming citizens of the United States by the forms of naturalization. See Rev. Stats., § 2312.

federal government. As a citizen, he is subject primarily to the police power of the state.[48]

30. **Suffrage.**—Among the political privileges most highly esteemed in a free government and most carefully protected is that of suffrage. Indeed, it is generally spoken of as a right; but it is not a fundamental right such as that of life, liberty, or property, but a privilege conferred for the general public benefit and welfare on those classes of persons who, it is assumed, are reasonably qualified to exercise it. Thus, although all persons, irrespective of their condition, are guaranteed protection as to their liberty and property, and all citizens, irrespective of age or sex, are protected in the privileges and immunities of citizenship, only those persons upon whom the right of suffrage has been conferred are protected in the enjoyment of that form of participation in the affairs of the government. The privilege is not granted to idiots or lunatics, nor to persons under the age of majority, nor, save now in some of the states, to women; nor in general to persons who are not citizens. It may be denied also to persons who have been convicted of crime, or to those who are bigamists or polygamists, or to those who have been guilty of the offense of betting upon the elections, or of malfeasance in office. Educational qualifications may also be imposed, and in the early history of the country it was not uncommon to require certain property qualifications. The exercise of the right may also be regulated by requiring a specified term of residence in the state, county, and municipality in which the right

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[48] In re Heff, 197 U. S. 488, 25 Sup. Ct. 506.

to vote is to be exercised. Other conditions may be imposed, such as that the voter shall be duly registered prior to the election and that he shall cast his ballot only in accordance with some prescribed form. Prepayment of taxes is sometimes required.

31. **Under state constitutions.**—If, as is usual, the state constitution prescribes the qualifications of voters, the legislature may not deny the right to any who are thus qualified, nor may it extend the privilege to any not thus qualified; but it may nevertheless regulate the method in which the right or privilege is to be enjoyed. And as to offices not contemplated or provided for in the constitution, the legislature in creating such offices may prescribe the qualifications of the voters who are to participate in filling them.

32. **Federal constitutional and statutory provisions.**—The provision of the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc., in no way impairs or restricts the powers of the respective states to determine who shall be entitled to suffrage therein. And it has accordingly been held that although women may be citizens of the United States and of the states in which they reside, the right to vote is not one of the privileges or immunities of such citizenship and that therefore women are not entitled to vote unless the franchise is conferred upon them by the state constitution or laws.[49] But the Fifteenth Amend-

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[49] Minor v. Happersett, 21 Wall. 162 (U. S.), LEADING ILLUSTRATIVE CASES.

ment expressly prohibits "the denial or abridgment by the United States or by any state of the right to vote on account of race, color, or previous condition of servitude," and Congress is given power to enforce the observance of this prohibition on the part of the states. To this extent, the right to vote is guaranteed by the Federal Constitution; although it is dependent for its definition on state constitutions and statutes. But a denial of or interference with the right on account of race, color, or previous condition of servitude not resulting from the exercise of federal or state authority is not subjected by this section to regulation or control of Congress.[50]

33. **Right to vote at federal elections.**—The only officers of the United States chosen by vote of the people are the President and Vice-President, who are indirectly chosen by popular vote in the selection of presidential electors, and senators and members of Congress, who are directly chosen by popular vote. The method of choosing the electors of the President and Vice-President is to be determined by the states, but Congress may determine the time of choosing such electors.[51] The qualifications of those who shall vote for presidential electors are, therefore, determined by the constitutions and laws of the states. As to the election of senators and congressmen, it is provided that they shall be chosen by the people of the several states; and that the electors in each state shall have the "qualifications requisite for the electors of the most numerous branch of the state legis-

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[50] James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678.

[51] U. S. Const., Art. II, § 1, pars. 2, 3.

lature."[52] Therefore, the right to vote for senators and members of Congress is dependent upon the constitution and laws of the state prescribing the qualifications for electors who shall vote in choosing the members of the lower house of the state legislature in that state. The right of one thus qualified to vote is, however, a federal right, and Congress has the constitutional power to pass laws for the protection and security of the right thus conferred by the Federal Constitution.[53] Senators of the United States formerly were chosen by the legislatures of the various states.[54] Since the adoption of the Seventeenth Amendment, they are elected directly by the electors. But the times, places, and manner of holding elections for United States senators and members of Congress, while they are to be prescribed in each state by the legislature thereof, may be regulated by Congress except as to the places of choosing senators,[55] and each house of Congress is declared to be the judge of the election returns and qualifications of its own members.[56] It is thus apparent that while Congress may exercise some control over federal elections,[57] the right of suffrage is dependent upon state constitutions and statutes subject only to the limits of the Fifteenth Amendment.

34. **Republican form of government.**—One of the

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[52] U. S. Const., Art. I, § 2, par. 1; Amend. XVII.

[53] Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152.

[54] U. S. Const., Art. I, § 3, par. 1; Amend. XVII.

[55] U. S. Const., Art. I, § 4, par. 1.

[56] U. S. Const., Art. I, § 5, par. 1.

[57] See for instance, Act of March 4, 1909, chap. 321, §§ 19-26, 35 Stats. at Large, p. 1092; Act of June 25, 1910, chap. 392, 36 Stats. at Large, p. 822; Act of August 19, 1911, chap. 33, 37 Stats. at Large, p. 25.

guaranties of political rights to the people of the respective states is that found in the provision of the Federal Constitution that "The United States shall guarantee to every state in this union a republican form of government."[58] While the guaranty is in language to the state, it is evident that in effect it is to the people of the state, for an infringement of it would be an interference with the theory of the American system of government, involving as it does a participation by the people in the establishment and maintenance of the government under which they live. A republican form of government is representative government as distinguished on the one hand from a pure democracy in which all power is exercised directly by the mass of the people acting as a whole, and on the other hand from a monarchy in which all power is exercised by and proceeds from a ruler, or an aristocracy in which all power is exercised exclusively by a privileged class. But a government may be republican in form, that is, a representative government, although the qualified electors to some extent determine by direct vote the laws by which they shall be governed; for instance, by means of the initiative or referendum. No matter how extensive may be the grant of the right of suffrage, it is evident that the body of the voters whose will alone is expressed in the choice of executive or legislative officers and in dictating their actions, must inevitably constitute less than a majority of all the people who are subject to the laws; and those who exercise the elective franchise, in a very proper sense, act only in a representative capacity; for the right to vote is, in itself, only a political privilege.

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[58] U. S. Const., Art. IV, § 4.

35. **Purpose of the provision.**—As the people of the colonies had been living under a government monarchical in form and were seeking to establish governments in which the power of the people should be substituted for that of a monarch and his representatives, it is evident the primary distinction sought to be established was that between monarchical and popular representative governments. It is also evident that the governments of the states which were coalescing to form a federal government by the adoption of a constitution ought to be of substantially the same general character.[59] It is assumed that the governments of the states forming the Union are republican, and the guaranty in the Federal Constitution has reference, therefore, to the maintenance in each state of a government which should be republican in form.[60]

36. **Changes in state governments.**—It is theoretically, though hardly practically, conceivable that the people of a state while it remains within the Union should attempt to establish some form of government not republican, by adopting a new constitution or amending the existing constitution. It would then be for the federal government to determine whether the change had been of such character as to render the state government unrepublican, and if so, to disregard the attempted change and take measures to provide for the organization, by the people of the

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[59] Federalist, Nos. 21 and 43.

[60] Minor v. Happersett, 21 Wall. 162 (U. S.), LEADING ILLUSTRATIVE CASES.

state, of a government which should be republican. An occasion to apply the constitutional provision did arise when, during the Civil War, some of the state governments ceased to perform their proper functions for the states as members of the Union and attempted to exercise authority under the so-called government of the Confederation. Thereupon, such states ceased to have governments which could exercise lawful authority, and it became incumbent upon the government of the United States to provide for the establishment of duly authorized governments for such states, which should be republican.

The difficulty was not, however, that the state governments attempting to form and carry on a confederation in rebellion against the government of the United States were not republican in form, but rather that they were not duly authorized governments of the states as members of the Union, and the duty of the United States was thereupon to provide some method for the organization, in the states whose governments had attempted to secede from the Union, of duly authorized governments for such states as members of the Union. This was done by the reconstruction acts passed by Congress.[61]

37. **Method of determining whether a state government is republican.**—The Constitution does not provide specifically any method to be pursued by the federal government in determining whether an existing or proposed state government is republican in form. But in the nature of things, whenever senators or representatives, selected by the states or

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[61] Texas v. White, 7 Wall. 700 (U. S.), LEADING ILLUSTRATIVE CASES.

their people, claim the right to sit in Congress, the practical question is presented, whether the state government, under the laws of which they have been selected or chosen, is in form republican; and that question is practically determined when the senators or members of Congress from a state are admitted to sit as representing the government and people of that state. When Congress admits a new state, it practically determines that the constitution under which it seeks admission provides for a republican form of government.

38. **Cases of invasion or insurrection.**—It is made the duty of the United States to protect each of the states "against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." In the discharge of this duty, the government of the United States must determine whether by invasion the authorized government of a state has been overthrown, and whether the legislature or executive of the state asking protection against domestic violations is the duly authorized legislature or executive of a state having a republican form of government; and if it appears that the regular government has been overthrown, or that the state on behalf of which relief is asked against domestic violations has not a republican form of government, then provision must be made for the organization within the state of a duly authorized government in accordance with such form.

39. **Political question.**—In these various ways, it may be necessary for the government of the United

States, or some branch of that government, acting within its proper scope, to determine, as between governments claiming to act for the state, which is the duly constituted government. Such a question is in its nature political, and not judicial, and the action of the proper branch of the federal government can not be reviewed or passed upon by the courts.[62]

40. **Titles of nobility.**—Another guaranty against the establishment in a state of a form of government not republican is the provision that no state shall "grant any title of nobility."[63]

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[62] Luther v. Borden, 7 How. 1 (U.S.); Pacific States T. & T. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224.

[63] U. S. Const., Art. I, § 10, par. 1.

CHAPTER III.

CIVIL RIGHTS AND THEIR GUARANTIES.

41. **Federal and state constitutional provisions.**—The principal function of an organized government is to protect the people in their civil rights; that is, in the enjoyment of all those privileges to which, as members of society, they are justly entitled. And collectively, these civil rights are involved in the enjoyment of liberty. More specifically, they are spoken of as involving life, personal liberty, property, and the pursuit of happiness, all subject to a restriction that the enjoyment of these rights on the part of any one person or class of persons shall not unduly infringe upon like enjoyment of rights on the part of others. Certain specific guaranties are found in state constitutions and in the Constitution of the United States, and these may now be properly described, bearing in mind the principle of interpretation already explained,[64] that the guaranties found in the first eight amendments of the Federal Constitution are only guaranties against action of the federal government, and that in general the protection of civil rights depends on the guaranties found in the constitutions of the respective states.

42. **Religious liberty.**—The Federal Constitution prohibits the requirement of any religious test "as a qualification to any office or public trust under the

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[64] See §§ 5-6.

United States,"[65] and also forbids Congress making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[66] But the state constitutions in various forms guarantee, in a broader sense, religious liberty, which involves not only religious toleration, but also religious equality. No discriminations are permitted on account of religious belief; indeed, civil government according to the American theory does not concern itself with matters of belief, but only with the actions and conduct of its members. On the other hand, religious belief, no matter how conscientious, is no excuse for the violation of the rules of civil conduct prescribed by lawful authority. Thus, it was held by the Supreme Court of the United States that belief on the part of the Mormons that polygamy was a divine institution would not excuse the violation of the law prohibiting plurality of wives.[67] In this case the court said: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

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[65] U. S. Const., Art. VI, par. 3.

[66] U. S. Const., Amend. I.

[67] Reynolds v. United States, 98 U. S. 145.

In another case,[68] the same court has explained at some length the guaranty of religious liberty. "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

"The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of

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[68] Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299.

Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker, and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

"There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States."

Religious liberty, however, involves more than the negative right of freedom of religious belief. Freedom in advancing religious interests should not be interfered with by government, unless a like liberty on the part of others having different religious interests is infringed. Government may properly recognize the existence of religious beliefs and take account of the fact that the fundamental principles of the Christian religion are recognized and accepted by a large portion of the people. Accordingly, it is deemed proper that religious services in accordance with the forms of the Christian religion and without discrimination as to sect be provided at the public expense in legislative assemblies and in state institutions.

43. **Protection of religious freedom.**—In providing for the preservation of the peace and good order of the people as a whole, the government may properly prohibit conduct which is shocking to religious sentiment, such as blasphemy, and may punish the obstruction of or interference with religious assemblies and exercises. It may also require cessation of usual occupations on the Sabbath day which is set apart by the majority of people as a proper day for religious services; and it may so far as it sees fit, make exceptions from the usual prescribed regulations of society in favor of members of a sect having a different religious belief from that entertained by the majority. Furthermore, it may so far take cog-

nizance of assemblies for religious purposes as to require that they be so conducted as not to interfere with the general good order.

44. **Taxation and exemptions.**—Taxes cannot be imposed for the support of religion, nor of any institutions which are in whole or in part designed to promote any particular form of religion, nor on the other hand, can discriminations on account of religion, be permitted which give a substantial advantage to those having a particular form of belief as compared with others. But it is not regarded as improper to exempt from taxation property devoted to religious purposes. The usual exemptions of church property so far as it is devoted entirely to religious uses, may be sustained on the assumption that the promotion of religion in general is of public interest and that the burden on property owners is not thereby materially increased.

45. **Bible in schools.**—The question has sometimes arisen in the courts whether the reading of the Bible in the public schools supported by general taxation may properly be authorized. In view of the declaration in the Ordinance of 1787 for the government of the North West Territory, that "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of educating shall forever be encouraged" (this Ordinance preceded the admission of states from such Territory and was recognized in the constitutions of such states), it has been held by the Supreme Court of Michigan[69] that the guaranty of

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[69] Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250.

religious liberty does not prevent the reading in the public schools as a part of the exercises thereof, extracts from the Bible so long as attendance upon such reading is not made a condition for enjoying the privilege of the schools. On the other hand, it has been held by the Supreme Court of Wisconsin[70] that the use of the Bible as a text book in the public schools and stated reading thereof, without restriction, is in violation of a provision of the state constitution prohibiting sectarian instruction in the schools of the state.

46. **Freedom of speech and the press.**—The right to entertain any political, religious, or social beliefs so long as they are not made the basis for unlawful acts, and the further right to express such beliefs, so far as their expression is not calculated to induce others to commit unlawful acts, are guaranteed by the usual constitutional provisions as to freedom of speech and the press. The exercise of these rights is subject to the limitation that the welfare of society, as a whole, must not be put in peril and the individual rights of other members of society must not be infringed. Indeed, the definition of these rights in itself involves the necessary limitations. The promulgation of beliefs which are derogatory to public institutions, or public officers, or even private individuals, may properly be restricted to suitable occasions, good causes, and justifiable ends. Freedom of discussion with reference to public affairs is essential to popular government but should not be permitted where its tendency is to overthrow organized govern-

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[70] State v. District Board, 76 Wis. 177, 44 N. W. 967.

ment, or interfere with the discharge of duty on the part of those acting under its authority. The private character of individuals should not be defamed, nor their property rights impaired by the promulgation or publication of derogatory statements save as the occasion may require in the discharge of some general or particular duty and then only with good motives.

47. **Privileged publications.**—The constitutional guaranties relate to oral communications and publications as well as to publications by writing, printing, or other methods of disseminating views and information; but they are peculiarly applicable to publications through the press. These are absolutely privileged so far as they record the actual facts of public proceedings such as the discussions in legislative assemblies, the public official acts of those discharging the duties of the respective offices of the government, and the proceedings in courts. They are conditionally privileged so far as they involve a discussion of the wisdom or motives of those discharging public duties, or of private persons whose acts in some way affect the public, the condition being that they be in good faith and in the public interest rather than to subserve private purposes.

There is a like conditional privilege as to communications and publications which are private in their nature or restricted in their scope. To justify a derogatory and injurious communication or publication even though not public in nature, there must be some duty to others to justify injury which may result. Thus, communications or publications of a libelous nature may constitute a crime if they tend to occasion a breach of the public peace, or to interfere with the discharge of duty on the part of public officers. And one who occasions injury to another by unauthorized and unwarranted publication of matter which is false, even though he believes it to be true, may be liable in damages for the injury thus caused.

48. **Censorship of the press.**—Down to near the time of the American Revolution, the government of England permitted only the publication of such books and papers as were licensed by some public authority and a like censorship was exercised to some extent in the colonies. But, under our constitutional guaranties, freedom of publication is unrestricted, subject to subsequent accountability for an improper exercise of the freedom thus accorded. To some extent, a censorship is still permitted with reference to dramatic representations, not by requiring a license, but by forbidding such productions as are likely to be injurious to the public peace or morals. Freedom of communication, publication, and representation is the rule, while restrictions upon such freedom are the exception and must be based on some ground of public interest or welfare.

49. **Use of the mails.**—To the proper freedom of the press, the right of circulation is as important as the right of publication and the usual method of circulation is through the postal service of the United States which Congress is authorized by the Constitution to establish and maintain.[71] The postal authorities could not properly exclude from the mails pub-

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[71] U. S. Const., Art. I, § 8, par. 7.

lications coming within the scope of the freedom of the press; but Congress may authorize the exclusion of matter, the distribution of which is contrary to public morals or the public welfare. It has, therefore, been held proper to authorize the postal authorities to deny the privilege of distribution through the mails, to obscene publications and lottery advertisements.[72]

50. **The right to assemble and petition.**—An important adjunct to the exercise of political privileges is the right of the voters to assemble for the purpose of discussing questions of public policy and interest, and to express their views by petition to public officers and to legislative bodies. But the right to assemble and petition guaranteed by constitutional provisions is broader in its scope and covers assemblages to promote religious, social, and industrial interests and to petition any person or body of persons having power to act in the matter in which the petitioners are concerned.

A petition on a proper occasion and with proper motives and for justifiable ends, is a privileged publication. Therefore, the right to assemble and petition in a peaceable manner and for legitimate objects, may be said to be a civil right. Indeed, it has been held that "the right of the people peaceably to assemble for the purpose of petitioning Congress for redress of grievances or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guaranteed by the United States."[73] And it may be well said that a similar right to assemble and petition is incident to state citizenship and may be exercised not only by those qualified to vote, but equally by those entitled to the protection of the laws. But the assemblage which is protected must be orderly and not calculated to endanger the public peace or safety and the petition must be within the general scope of the privilege accorded under the guaranty of freedom of speech and the press. Riotous assemblages or those which, under the circumstances, tend to interfere with the general use of the public streets or with the transaction of public business, may properly be prohibited or suppressed by state authority or by municipal authority under power delegated by the state to the municipal government.

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[72] Ex parte Jackson, 96 U. S. 727; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374.

51. **Right to bear arms.**—One of the complaints in the English Petition of Rights was that protestant subjects were disarmed while adherents of the church recognized by the government, were permitted to carry arms in their defense. Perhaps this grievance was the occasion of special consideration on the part of the colonies of the privilege of bearing arms. But there was a further grievance to the Colonists in the maintenance of standing armies in time of peace without the consent of the colonial legislatures. The usual constitutional provisions relating to keeping and bearing arms is connected with the declaration that a well regulated militia (as distinct from a standing army) is necessary to the security of a free

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[73] United States v. Cruikshank, 92 U. S. 542.

state.[74] The states may, therefore, in the protection of the public peace, safety, and good order, prohibit the unauthorized organization, drilling, and parading of military bodies and associations.[75] And, while private persons may properly carry arms for necessary self defense or in the protection of their property, the method and occasion of doing so may be prescribed by law. Statutes prohibiting the carrying of concealed weapons have generally been sustained.

52. **Security of the dwelling and the person.**—The general guaranty of "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures,"[76] is a formal recognition of rights of personal liberty, and privacy and protection in the home which the common law, both in England and America, has always assumed to exist without special guaranty. The protection of personal liberty is secured by the usual constitutional provisions, but the maxim of the constitutional law of England expressed in the common saying that "every man's house is his castle," finds here a specific endorsement. The home of no man can be lawfully invaded against his will save in accordance with established forms of procedure and under duly authorized warrant or upon lawful occasion; and the right to resist an unlawful invasion even to the extent of taking life, if necessary, is fully established. But security and privacy of the home is not allowed

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[74] The provision found in Article II of the Amendments to the Federal Constitution, is typical of the provisions in many of the state constitutions.

[75] Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580; Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138.

[76] U. S. Const., Amend. IV. There are similar provisions in the state constitutions.

to stand in the way of due and regular administration of the law. It cannot be made the place for committing crime, harboring criminals, or escaping justice. Entry into a private house may be forced by those who are authorized by law to do so in making a criminal arrest or preventing the commission of a crime but not for the purpose of serving civil process, unless after proper adjudication it has been determined that another is entitled to possession. There may, however, be other lawful occasions to invade the dwelling, such as the seizure of the instrumentalities or fruits of crime and the procuring of evidence in criminal prosecutions, or for the enforcement of proper police regulations; and the guaranty as to these is found in the constitutional provisions just referred to, which provide that "no warrants shall be issued, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

53. **Search warrants.**—The immediate grievance which led to the adoption of the specific constitutional guaranty was, no doubt, a practice which had grown up in England of issuing general warrants for the arrest of persons and seizure of property without specifying the persons to be arrested or the property to be seized. Within a few years before the Revolution, these warrants had been condemned by the courts of England as unlawful and it had been held that a warrant to be a valid protection to the officer or person acting under it, must be issued by a magistrate upon the oath of an accuser, stating name,

time, place, and nature of the offense referred to with reasonable certainty.

The occasion for our constitutional guaranties in this respect seems to have been the desire to preserve this safeguard as an essential part of our constitutional system. That an entry into a dwelling house to make an arrest of the person or seizure of papers and effects therein, shall not be unreasonable within the constitutional prohibition, it is necessary that the warrant be specific and not general, that it be issued in pursuance of law, and on the oath or affirmation of some person, showing probable cause to believe that there is some proper occasion for its service and that it particularly describes the place to be searched and the persons or things to be seized. So far as search warrants may be resorted to for the purpose of procuring evidence of the commission of crime, they are subject to the further limitation to be hereafter noticed that in criminal proceedings no one shall be required to furnish evidence against himself; and the two provisions together prevent the search and seizure of private papers, correspondence, and memoranda for the purpose of criminating one in whose possession they are found.

54. **Quartering of soldiers.**—A grievance complained of in the English Petition of Rights was that the people had, against their will, been compelled to receive soldiers into their houses and suffer them to remain to their great grievance and vexation, and one of the complaints in the Declaration of Independence was that the Crown of England had quartered large bodies of armed troops among the Colonists.

The justice of these complaints cannot be questioned and the wrong involved was so great as to indicate the propriety of the constitutional guaranty that "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."[77] Fortunately no occasion has arisen and in all probability no occasion is likely to arise for the application of this constitutional guaranty to any particular case. The complete separation of the civil and military powers and the recognition of the superiority of civil rights to military necessity in time of peace, render it practically impossible that there shall be any just complaint on account of the usurpation of military authority.

55. **Personal liberty.**—Among the rights which together constitute civil liberty and which the constitutional guaranties are intended to protect, is that of individual personal liberty; as to which, however, there is no specific guaranty, no doubt, for the reason that it is assumed as an existing condition lying at the foundation of organized government. It is not implied that each member of society is entitled to do what he pleases and be free from all restraint; for that measure of liberty is inconsistent with social order and subversive of the very objects of government. But it is implied that each person shall have as large a measure of individual freedom from restraint as is consistent with like freedom on the part of other members of society. "If each cannot have all the rights he might have as a solitary being, he must have

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[77] U. S. Const., Amend. III, and similar provisions in state constitutions.

all which are consistent with the existence of the highest practical rights of others. If there be conflict, it must be reconciled by such a compromise as will attain the best devélopment, the highest happiness and well-being of all. Neither part must seek for itself a greater elevation by the deeper depression of the other; but each must so adjust itself to a social equilibrium, that the maximum elevation of each be avoided.

"Thus, where two conflicting interests are combined in a society, civil liberty will consist in the preservation of that equilibrium, where the social rights of each so modify those of the other as to preserve to each the greatest amount of right and freedom consistent with their co-existence in social combination. In this there may be what appears to be an abridgment of liberty; but it is the abridgment of the liberty of *isolation*. It is not an abridgment of *social* or *civil* liberty, which is the highest liberty which either interest can enjoy consistently with their coherence in society."[78]

In securing the civil rights of all, some restraints upon personal liberty are necessarily involved and, therefore, are recognized as lawful. Thus, the parent may properly exercise some control over the actions and conduct of his infant child; the teacher may exercise authority over his pupil; those who, for want of natural mental capacity, are unable to properly care for themselves, may be restrained by persons duly authorized for that purpose; those who have subjected themselves to punishment for crime may be kept in confinement in pursuance of the provisions of the criminal law. Personal liberty, like other civil rights, rests for its protection on the laws of the land.

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[78] Tucker, Constitution of the United States, vol. I, p. 23.

56. **Habeas corpus.**—The right to personal liberty is impliedly guaranteed in the constitutional recognition of the preservation of the writ of habeas corpus which in England had been regarded as the legal bulwark of that right. The essence of the proceeding by habeas corpus is a determination by the judicial power of any question of personal liberty arising on account of interference with individual freedom by any executive authority not acting in pursuance of law and in contravention of civil rights. In such proceeding the validity of the action of any one who is interfering with the individual liberty of the person on whose behalf complaint is made, may be inquired into. Therefore, the constitutional recognition of the power of the courts to inquire into the question of unlawful restraint, is also a constitutional recognition of individual liberty as a civil right. But the express guaranties in regard to the writ of habeas corpus relate to the power of the executive to suspend the writ, that is, to supersede, for the time being, the power of the courts in that respect; and they will be further discussed in treating of the supremacy of the civil over the military power.[79]

57. **Slavery prohibited.**—Although in England a condition of servitude involving the denial to a considerable portion of the people of that personal liberty which was recognized as the birthright of free-

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[79] See § 109.

men had existed unquestioned, notwithstanding the theory of general equality before the law, such distinction had practically disappeared long before the independence of the colonies. Slavery in the proper sense of that term, implying a personal servitude of one to another based on a condition arising by birth, was never recognized. The institution of negro slavery never existed in England, and when its courts met the question whether one who had been elsewhere a slave on account of his status, continued to be a slave in England when brought there, it was held that slavery was repugnant to the common law and the bringing of a slave into England necessarily resulted in his emancipation. But in the American colonies, that institution did exist to a considerable extent, and it was not abolished by the constitutional guaranties of personal liberty usually inserted in state constitutions.

While the Federal Constitution did not expressly recognize the continued existence of slavery, it contained provisions impliedly authorizing the continuance in the states of such an institution. In the course of time, slavery ceased to exist in many of the states, and in some of them was distinctly prohibited; but not until slavery had been practically abolished throughout the Union as a result of the Civil War, was there any guaranty in the Federal Constitution which rendered its continuance unconstitutional. That guaranty was embodied in the Thirteenth Amendment, adopted in 1865, expressly providing that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction," and Congress was given power by that Amendment to enforce its provisions by appropriate legislation. Since the adoption of this Amendment, slavery in any form and involuntary servitude, save as the result of punishment for crime, are prohibited. "The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses."[80] These incidents of slavery Congress had power under the Thirteenth Amendment to prohibit throughout the United States, but it did not, as a result of that Amendment, have authority to legislate as to the general civil rights of those who had been in slavery.

58. **Peonage.**—The only controversies which have come before the courts for decision directly involving the application of the Thirteenth Amendment have been those in which the question was whether that Amendment prohibited the form of involuntary servitude arising from a recognition, in territory derived from Mexico, of the institution of peonage. Assuming to act under the authority given by the Thir-

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[80] Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18.

teenth Amendment, a statute was passed by Congress forbidding the holding of any person to service or labor under that system of compulsory service for the payment of a debt. In applying that statute, it was said by the Supreme Court of the United States that peonage is "a status or condition of compulsory service based upon the indebtedness of the peon to the master"; and it was further said, "Peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of service in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."[81]

59. **Due process of law.**—Among civil rights, none is more zealously cherished than that of the protection of the law in the enjoyment of life, liberty, and property. This is the most important guaranty found in Magna Charta; and in its various forms it was preserved in many of the early state constitutions.[82] It was embodied in the Federal Constitution by one of the early amendments,[83] as a limitation on

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[81] Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429. And see Bailey v. Alabama, 219 U. S. 219, 31 Sup. Ct. 145.

[82] See for instance, the Constitution of Massachusetts (1780), Part the First, Article XII; Constitution of Connecticut (1776), Paragraph Two.

[83] Amend. V.

federal power and finally in the Fourteenth Amendment, it was embodied as a federal limitation on the exercise of state power. It is immaterial what form of guaranty is used, whether it relates to "due process of law" or "the law of the land" or "due course of law," the essential meaning being the same. These phrases have as their fundamental basis the recognition without specific definition of the existence of rights of life, liberty, and property and the purpose of the guaranty is to protect the infringement of these rights against the exercise of arbitrary power by the federal government, or by the government of any state.

A definition frequently quoted is that of Daniel Webster in his argument in the Dartmouth College Case.[84] "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." In the same connection he used this language: "Everything which may pass under the form of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

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[84] Dartmouth College v. Woodward, 4 Wheat. 518 (U. S.), LEADING ILLUSTRATIVE CASES.

An eminent judge of the Supreme Court of the United States has said:[85] "As to the words from Magna Charta incorporated in the Constitution of Maryland [the guaranty to freemen against deprivation of rights otherwise than by the law of the land], after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." The limitation is upon all branches of government and requires that each proceed within the general scope and in accordance with the general principles of that branch. It does not mean that any particular form shall be preserved but that substantial rights shall not be infringed. "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."[86]

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[85] Johnson, J., in Bank of Columbia v. Okely, 4 Wheat. 235, 244 (U. S.).

60. **Forms of procedure.**—By due process of law is not meant, therefore, merely proceedings in the courts. The guaranty is of civil rights and against their infringement. Even property rights may be affected by governmental action which is not in its nature judicial; and illustrations will be given in the fuller discussion hereafter of general protection of personal and property rights.[87] The fundamental requirement is that each department of government keep within the scope of its power, and that within its scope, it follow the general accepted principles in accordance with which its power is to be administered. Thus the legislative department, while authorized to make laws, must confine itself to the legitimate function of law making and cannot determine questions of private right, nor interfere with vested rights,[88] and the executive department must confine itself to the general function of the administration and the execution of the law without attempting either to legislate on the one hand or on the other hand adjudicate personal and property rights. The military power is vested in the executive branch of the government, but as will be hereafter seen it must act in subordination to civil authority so far as the rights of the individual are concerned, save in recognized cases of extreme emergency. Proceedings in courts are confined to their proper form and function and an action which is not within the scope of the judicial

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[86] Cooley, Constitutional Limitations (7th ed.), p. 506.

[87] See §§ 85-116.

[88] See § 92.

power or which is not in accordance with the general recognized methods of the common law, must necessarily be invalid.[89]

61. **Equality before the law.**—While the Declaration of Independence and some of the bills of rights in the various states contain a general assertion that all men are equal, the equality referred to is equality of protection rather than equality of possession; and this is typified in the provision of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This is no more than to say that special favors shall not be conferred by law either in the provisions for the enjoyment or the protection of civil rights and that every person shall have access to the courts for securing his rights.[90]

62. **The persons protected.**—Civil rights are not merely the privileges and immunities of citizenship. Persons who are not citizens are, nevertheless, entitled to civil rights and to the remedies for their preservation and infringement. For instance, an alien is entitled to sue and to defend in a court of justice, and while his property rights and personal privileges may not be the same as those of a citizen, whatever they are he may rest on the security of the law for their enjoyment. In speaking of the rights of the subjects of China residing in the United States to the protection of due process of law, the Supreme Court of the United States uses this language: "The Fourteenth Amendment to the Constitution is not confined to the

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[89] See § 111.

[90] Further as to equal protection of the law, see §§ 90-91.

protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the stranger and aliens who now invoke the jurisdiction of the court."[91] Even political privileges, though conferred only by law, become rights in the person upon whom they are conferred, of which he cannot lawfully be deprived, and for the infringement of which he may have redress.

63. **Corporations.**—The privilege of acting in a corporate capacity is conferred only by law; but when it has been conferred, its enjoyment is not to be interfered with save by due process of law and

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[91] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064.

the privilege is under the equal protection of the laws. Therefore, while a corporation is not a citizen,[92] it is entitled to sue and defend in the courts and it may not be deprived of its property on other grounds than those which are applicable with respect to the property of natural citizens.[93]

64. **Jury trial in civil cases.**—In one very important respect, the forms of procedure even in civil cases are controlled by constitutional guaranties; for it is provided in some form in many of the state constitutions that the right of jury trial as it was known at common law, shall be preserved; and Article VII of the Amendments to the Federal Constitution contains a like guaranty as to trials in the federal courts in civil cases. This institution had been regarded as one of the chief glories of the English common law. Blackstone, whose Commentaries on the laws of England were written not long before the American Revolution and attained almost immediately a wide circulation in the colonies, speaks of it as an institution which "has, under Providence, secured the just liberties of this nation for long succession of ages," and he thus justifies his eulogium: "The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have fre-

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[92] See § 20.

[93] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418.

quently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts.

"It is wisely, therefore, ordered that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope; the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve different men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must, of course, redress it. This, therefore, preserves in the hands of the people that share, which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. * * * It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.''[94]

The notion that the system of jury trial, as we now understand it, was prevalent in England prior to the date of the Magna Charta and was intended to be preserved by the declaration in that instrument which provided that no free man shall be deprived of his liberty or property ''unless by the lawful judgment of his peers or by the law of the land,'' is probably erroneous; but at the time the American colonies became independent and adopted their constitutions, the ordinary method of the trial of questions of fact in the common law courts was by means of a jury and it is this method of trial as then recognized which our constitutional guaranties as to jury trial were intended to preserve.

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[94] 3 Blackstone, Commentaries, p. 379, 381.

Calling attention to the fact that the form or method of procedure required in the guaranty of jury trial is nowhere defined or described in our constitutions, an eminent judge has said, "It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. * * * The institution of the jury referred to in our Constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same brought to this continent by our forefathers, and perseveringly claimed as the birthright in every contest with arbitrary power, and, finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. Nor did their affection for it then diminish or cool. They made it a corner-stone in erecting the state governments; and after the adoption of the Federal Constitution without a provision securing it, they did not rest satisfied until they had proposed and carried an amendment giving to every person accused of crime in the courts of the Union 'the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.'"[95]

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[95] Judge Ranney, in Work v. State, 2 Ohio St. 296.

And another eminent judge has said, "The constitutional principle which underlies the right is one to which the people governed by the common law have clung with perhaps more tenacity than any other; and they have justly regarded it as not preserving simply one form of investigating the facts in preference to another where both would have attained the same result, but as securing the mode of trial which was best calculated to insure a just result, and to secure the citizen against the usurpation of authority, and against arbitrary or prejudiced action on the part of single individuals who chanced to be possessed of judicial power."[96]

65. **Essentials of jury trial.**—The guaranty of trial by jury does not necessarily require that all the formalities be preserved as they existed at the time the constitutions were adopted, but only that its essential characteristics shall be maintained. The first of these is that the jury for the trial of the case constitutes a branch or portion of a court presided over by a judge who decides questions of law, leaving to the jury the determination only of questions of fact. The judge determines what are the questions to be tried, rules upon the admissibility of the evidence offered and instructs the jury as to the law with reference to the facts which the evidence tends to establish. These instructions on the law are binding upon the jury, for it is as important that the questions of law be determined by a judge qualified to pass upon them as that the questions of fact be left to the determination of a body of men qualified to render a

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[96] Chief Justice Cooley, in Van Sickle v. Kellogg, 19 Mich. 49.

decision on the facts but not supposed to be versed in the law. The final result of the trial is pronounced by way of judgment by the court, involving the conclusions of the judge as to the law and the jury as to the facts. The second essential is that the jury consist of twelve qualified jurors rendering an unanimous verdict. While the number twelve is not sacred, the common law jury consisted of that number and where jury trial is constitutionally guaranteed without limitations, a jury of twelve is implied and the unanimous agreement of all the jurors is essential to a valid verdict.

Jury trial is not essential to due process of law and it may be provided in state constitutions that a less number than twelve may constitute a jury and that less than the whole number of jurors may return a verdict; for the guaranty in the Federal Constitution is one as to trials in the federal courts.[97] The qualifications of jurors are regulated by statute. It is usually required that the jurors be citizens of the United States and of the state, and that they be electors. But there are also additional requirements as to soundness of mind and the possession of the essential faculties of sight and hearing. For the purpose of securing a fair trial it is usual to provide for the selection by lot from a larger number of qualified persons, of the twelve particular jurors who are to serve in the case and for the exclusion, in making such selection, of those who by reason of prejudice or special interest, are likely to be biased against the one party or the other. The third essential is that the jurors be sworn to discharge their duty impartially and without interest or bias, that during the trial they be not subjected to improper influences, that during their deliberations they give consideration only to the evidence received in the case, and that they agree to a verdict as a result of such deliberations and in the exercise of an honest judgment.

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[97] Walker v. Sauvinet, 92 U. S. 90.

66. **In what cases jury trial required.**—It was not the purpose of the constitutional guaranties that jury trials should be required in cases not triable by jury at the common law. That form of trial was not essential in courts of equity or of admiralty, and so far as our courts administer equity or admiralty jurisdiction, the guaranty has no application. In courts of inferior jurisdiction such as those of a justice of the peace, it is not essential that the trial of issues of fact even in law actions be by jury, provided a right of appeal to a court of general jurisdiction be preserved in which a trial by jury may be had. The provision of the Federal Constitution guarantees jury trial in civil cases only when the amount in controversy exceeds twenty dollars. As the right of jury trial is one of the guaranties of civil rights, it may be waived by a party entitled to it and the failure to comply with the reasonable requirements of the law for securing that form of trial will be a waiver of the right. Therefore, in many cases where either party would be entitled to a jury, the case may, in fact, be tried by a court sitting without a jury and a valid judgment may be rendered.

67. **Review on appeal.**—The provision in the

Federal Constitution that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law,"[98] is not in effect different in result from the usual constitutional guaranty of jury trial without such specific provision. On an appeal to a higher court for the review of a judgment rendered in a court of general jurisdiction, the question to be determined is whether any material error of law was committed in the proceedings resulting in such judgment; and it is not the function of the appellate court to review the decision of the lower court so far as it relates only to questions of fact as distinct from questions of law. The appellate court does not have the witnesses before it and it interferes with the verdict of the jury as to questions of fact only when it appears that owing to errors in the proceedings committed by the trial judge, the case, so far as it involves questions of fact, has not been fairly submitted to the jury in accordance with the rules of law applicable and has not been determined by the jury in accordance with such principles of law in the exercise of a fair and unbiased judgment.

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[98] U. S. Const., Amend. VII.

CHAPTER IV.

PROTECTION OF PERSONS ACCUSED OF CRIME.

68. **Trial and procedure.**—The general guaranties against a deprivation of life, liberty, or property without due process of law,[99] necessarily assume that life, liberty, and property are enjoyed and protected in accordance with law and that on proper grounds and in a proper procedure, they may be forfeited. One of the universally recognized methods of compelling the members of society to comply with the necessary restrictions on the enjoyment of life and liberty and the use of property essential to preserve a like enjoyment and use on the part of other members, is by the infliction of a criminal punishment on any person who violates such restrictions, and such punishment may consist in the forfeiture of property or of liberty or even of life. But such forfeiture is to be enforced only in accordance with due legal procedure, that is, due process of law; for, however such enforcement may be attempted, it falls within the proper function of the judiciary department of government to determine the sufficiency of the grounds of forfeiture relied upon and the sufficiency of the methods which may be resorted to. In short, where the deprivation of life or liberty or the forfeiture of property is by way of punishment for a crime, it must first appear that the act or conduct which it is sought

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[99] U. S. Const., Amend. V, and Amend. XIV, § 1. Similar provisions are found in all state constitutions.

to punish, is made criminal by the law, that the act or conduct complained of has been in fact committed and that the determination of the fact has been in the recognized method for judicially determining such questions. The power to declare what conduct is so detrimental to the public welfare as to be punishable as a crime, rests with the legislature in the exercise of its broad police power.[1] But the determination of the guilt of a person accused of crime rests with the judiciary. The function of the executive in this connection is to enforce the judgments of the courts.

69. **Due process of law in criminal procedure.**—The essentials of a criminal proceeding in which a person may be deprived of life, liberty, or property have always been recognized under our constitutional system as substantially these: first, the procedure must be for some act or conduct which is by law declared to be criminal; second, the person to be punished must have been charged with such criminal misconduct as the law declares to be punishable; third, there must be a judicial trial in which the accused has the opportunity of making his defense; and fourth, there must be a judgment or sentence of the court finding him guilty and determining the punishment to be inflicted. These are, in a general way, implied in the guaranties as to due process. But there are specific guaranties as to criminal procedure which will now be separately noticed.

70. **Bills of attainder—Ex post facto laws.**—The specific limitation on the power of state or federal legislatures to declare what conduct shall be crimin-

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[1] See §§ 93-100.

ally punishable is that found in the provisions of the Federal Constitution prohibiting both the state and the United States from passing bills of attainder or ex post facto laws.[2] There are similar prohibitions in state constitutions. A bill of attainder is a statute imposing criminal punishment without judicial trial for an act already committed, irrespective of whether it was criminal or not when committed. Such a statute is objectionable because it transcends the legislative power and invades the province of the courts.

An ex post facto law is a retrospective statute relating to the punishment of crime; and the prohibition extends to statutes which make acts criminal which were not criminal when committed, or provide a more severe punishment for crimes already committed, or change the rules of procedure so as to make it more difficult for one accused of a crime already committed, to defend in a prosecution for such crime. In pointing out the distinction between an ex post facto law which is prohibited by the Constitution and a retrospective law which may be valid, Mr. Justice Chase of the United States Supreme Court uses this language, which has often been referred to with approval: "The prohibition of the letter (of the constitutional provision against ex post facto laws) is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact and shall punish him for having done it.

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[2] U. S. Const., Art. I, § 9, par. 3, and § 10, par. 1.

The prohibition considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts." And he proceeds to say:

"I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws.

"Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the Statute of Limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime."[3]

71. **Changes in procedure.**—But the legislature is not prohibited from changing the mere rules or methods of procedure to be applied on the trial of crimes already committed. "A party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence, when its facts arose. The legislature may abolish

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[3] Calder v. Bull, 3 Dall. 386 (U. S.).

courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."[4]

It is important, therefore, when a criminal statute is repealed and another statute enacted in its place relating to the punishment of any act as criminal, that there be a saving clause providing that prosecutions for crimes already committed in violation of the repealed statute may be had in accordance with the provisions of the law when the criminal act was done; for there cannot be a prosecution for an act which was punishable under the repealed statute unless such statute is by special provision continued in force for that purpose, and there can be no prosecution under the new statute, for, as to crimes already committed, such new statute would be ex post facto.

72. **The accusation.**—The usual method of charging the commission of a crime with a view of inflicting punishment on the offender is by presentment or indictment of a grand jury. This involves the finding by twelve grand jurors that there is reasonable ground to believe the person whose conduct is being investigated to have committed a specific criminal offense. The method of selecting the members of the grand jury and the number of grand jurors who shall act, not less than twelve nor more than twenty-three, is fixed by statutory provisions. The method of bringing the case to the attention of the grand jury is also

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[4] Cooley, Constitutional Limitations (7th ed.), p. 381.

a matter for statutory regulation. It is usual to provide for some kind of information on oath, filed before a magistrate, on which he may issue a warrant of arrest and under which he may hold a preliminary examination to determine whether the accused shall be bound over to await the action of the grand jury. But these steps are not essential to due process, and a duly constituted grand jury may inquire, on its own motion or on information brought to its notice, into the commission of crime within the jurisdiction of the court under whose authority the grand jury is constituted. The grand jury may hear evidence for the purpose of determining whether there is reasonable ground to believe that a crime has been committed and that a particular person or particular persons are guilty thereof; but the grand jury is not constituted to determine the guilt or innocence of the person or persons whose conduct they investigate and is not required, therefore, to hear evidence in his favor, although it may do so in its discretion. An accusation of crime by presentment or indictment of a grand jury is made when a formal charge is embodied in an indictment duly returned into court, signed by the foreman.

73. **Whether indictment essential.**—In the absence of specific constitutional guaranty, it is not essential to due process of law that the accusation be by indictment. Some other form of criminal charge, such as an information sworn to by a private accuser and filed with a prosecuting officer or magistrate, is sufficient, and where there are constitutional provisions specifically requiring indictment by grand jury,

there is always a limitation of such guaranty to criminal charges of a grave nature, such as capital offenses and felonies, and it is allowable to try prosecutions for petty offenses without the intervention of a grand jury. But in cases where indictment by grand jury is specifically required, without provision as to the number, twelve must concur in the finding of the indictment. It is not unusual, however, by a specific provision, to authorize grand jurors of a less number than twelve and to allow indictments to be returned by the concurrence of a smaller number of grand jurors than required to constitute a common-law grand jury. In order, therefore, to determine whether one accused of crime may be put on trial without indictment or upon indictment by a less number of grand jurors than twelve, it is necessary to consult the provisions of the state constitutions.[5]

74. **In federal courts.**—But the specific provisions of Amendment Five to the Federal Constitution, applicable to proceedings in federal courts, requiring that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger," make it necessary that prosecutions for all the graver crimes under the laws of the United States be by presentment or indictment of a grand jury constituted in accordance with the common law. Capital crimes are those which are punishable or may

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[5] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, LEADING ILLUSTRATIVE CASES.

be punishable at the discretion of the court by the infliction of the death penalty, and infamous crimes are those for which the punishment that may be inflicted is imprisonment in the penitentiary.[6] Crimes not of so grave a nature may be prosecuted by indictment or by information as may be provided by law. The express exception of cases in the land or naval forces or in the militia, when in actual service, in time of war or public danger, relates to courts martial, which have authority to punish violations of the military law, under the rules which Congress is expressly given authority to make for the government and regulation of the army and navy,[7] and the ordinary constitutional limitations have no application to such courts.

75. **The trial.**—It is essential that the court in which a criminal prosecution is tried shall be one duly constituted with authority not only to try and determine criminal cases of the grade and degree of crime including the crime charged in the particular case, but also that they have jurisdiction of that particular case by the arrest of the accused under process of that court. Corporations may be put on trial without arrest because, being artificial persons, no personal arrest is practicable; and in some other cases, usually of an inferior character, the prosecution may be had on service of some form of process without actual arrest; but in general the arrest of the accused is essential to the authority of the court to proceed to trial. The place of the commission of the offense is

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[6] Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777.

[7] U. S. Const., Art. I, § 8, pars. 14, 16.

also material in determining the jurisdiction of the court; for the courts of one state have no power to inflict punishment for crimes committed in another state, and within any particular state it is usually required that the prosecution be in a court for the district or county within which the crime is committed. In the Sixth Amendment to the Federal Constitution, it is specifically provided that prosecutions in the federal courts shall be before an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and there is a further provision that trial of all crimes, except in cases of impeachment, shall be held in the state where the crime was committed, and when not committed within any state, then at such place or places as Congress may by law have directed.[8]

76. **Trial by jury.**—In the Federal Constitution, as originally adopted, there was a specific guaranty with reference to the federal courts, of trial by jury in criminal cases,[9] and such guaranty is repeated in connection with other specific provisions in the Sixth Amendment, relating to criminal prosecutions in such courts. The state constitutions contain similar guaranties. What has already been said as to the preservation of jury trial in civil cases is applicable with still greater force in criminal proceedings, and there has never been any indication of a desire to substitute any other method of trying issues of fact in prosecutions for crimes of a graver nature. What was said

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[8] U. S. Const., Art. III, § 2, par. 3.

[9] Art. III, § 2, par. 3.

by a great commentator early in the history of our constitutional system, remains the sentiment of those whose judgment is of weight in establishing the proper policy of the criminal law: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies! The appeal for safety can under such circumstances scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the government, and against the passions of the multitude who may demand this victim with their clamorous precipitancy. So long indeed as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall. But to give it real efficiency, it must be preserved in its purity and dignity, and not, with a view to slight inconveniences or imaginary burdens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent arm."[10]

77. **Acquittal conclusive.**—The great significance, however, of jury trial in criminal cases results from a rule not applicable in civil cases, that a verdict of acquittal, after the defendant has been properly put on trial before a jury, is conclusive and cannot subsequently be reviewed on appeal; that is to say, when the trial has commenced, the defendant has been put in jeopardy, and he cannot be put in jeopardy a second time for the same offense, no matter what errors may have been committed in the course of the trial, provided such trial results in a verdict of not guilty.[11] The power of the jury to render a verdict of not guilty, notwithstanding the evidence which is submitted, and the rules of law laid down by the court, is, therefore, an essential characteristic of the trial by jury in criminal cases guaranteed by the constitutional provisions.

78. **Waiver of trial by jury.**—While it is usually said that the right to trial by jury in criminal prosecutions may not be waived by the defendant, there seems to be no good ground for holding that this constitutional privilege, like other privileges of the same character, may not be waived by the defendant if he avails himself of a privilege given to do so. But there is usually no provision for the trial of an issue of fact in a criminal case in any other manner than before a jury, and in the absence of such provision no court can proceed otherwise in the trial of such

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[10] Story, Commentaries on the Constitution, § 1780.

[11] As to twice in jeopardy, see § 84.

an issue. Where it is provided by law, however, that a court without a jury or with a jury of a less number of jurors than required by the common law may proceed to try a criminal case by defendant's consent, there seems to be no ground for holding that such trial is not constitutional.[12] And it is well settled that by a plea of guilty the defendant may waive a jury, and a conviction by the court based on such a plea will be valid, the degree of crime and the extent of the punishment being fixed by the court on evidence introduced, if necessary, for that purpose.[13]

79. **Other essentials of trial in criminal cases.**—The usual constitutional provisions as to trial of criminal prosecutions preserve other essential characteristics of the common-law method of jury trial. It must be speedy, that is, at as early a term of court as is practicable under the usual method of criminal procedure. It must be public, that is, in open court and in the presence of the defendant unless he has, in some way, waived his right to be present. The defendant is entitled to have witnesses called and examined in his behalf; and he is entitled to be confronted by the witnesses against him; that is to say, the testimony cannot be taken by depositions, as is permitted under some circumstances in civil cases. But the right to be confronted with the witnesses does not prevent the court from receiving evidence of dying declarations in a proper case, nor of receiving in evidence the testimony of witnesses on a previous trial who have since died or gone beyond the jurisdic-

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[12] Harris v. People, 128 Ill. 585, 21 N. E. 563.

[13] Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105.

tion of the court.[14] The accused is also entitled to the assistance of counsel in his defense, if he desires such assistance; and this right to be represented by counsel versed in the law and therefore competent to advise the defendant as to his legal rights at every stage of the proceedings, is regarded as a valuable and essential privilege. The common-law right of the defendant to be released on bail after arrest and pending the trial, save in capital cases, is recognized by the usual constitutional provision that excessive bail shall not be required; and the privilege usually accorded by law is extended to the period during which the case is pending on appeal to a higher court, after conviction.

80. **Self-incrimination.**—With but two exceptions, the constitutions of the states contain a guaranty similar to that found in the Fifth Amendment to the Federal Constitution, that the accused shall not be compelled to be a witness against himself; with the result that the defendant may not be required to testify, although he may be permitted to do so; that an admission of guilt made outside of court may not be proven against him unless voluntarily made; and that in any trial a witness may not be required to give testimony which could be used against him if he should be subsequently put on trial for an alleged crime committed in the same general transaction, unless it be expressly provided by statute that the evidence which he is thus required to give cannot be used against him on such subsequent trial.[15]

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[14] Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. 337.

[15] Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.

81. **Unreasonable searches and seizures.**—The guaranty against unreasonable searches and seizures, which has already been referred to,[16] is of special significance in criminal cases. It prohibits the resort to general warrants and searches of the person or house of the accused for the purpose of securing private papers which under the guaranty against self-incrimination the defendant would not be required to produce or disclose. The seizure of a man's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself. And this protection is available not only as against an attempt to obtain evidence to be used in a criminal prosecution, but also as against suits for penalties and forfeitures incurred by the commission of a crime.[17]

82. **Conviction and sentence.**—From the nature of the guaranties as to the method of trial, it is evident that criminal punishment cannot be imposed save as the result of a trial had in accordance with the methods required by constitutional provisions. Any imprisonment as a punishment not regularly imposed in accordance with these provisions is unlawful, and the person thus unlawfully imprisoned may be released by habeas corpus proceedings. But the only specific constitutional guaranty as to punishment is that cruel and unusual punishments shall not be inflicted.[18] "The provision in reference to cruel and unusual punishments was taken from the well-

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[16] See §§ 52-53.

[17] Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524.

[18] See U. S. Const., Amend. VIII, and similar provisions in state constitutions.

known act of Parliament of 1688, entitled 'An act declaring the rights and liberties of the subject, and settling the succession of the crown,' in which, after rehearsing various grounds of grievance, and among others, that 'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted,' it is declared that 'excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Stat. 1 W. & M., c. 2.)'

"This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the state of New York was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eighth Amendment, in its application to Congress."[19] Capital punishment is, therefore, permissible, and the method of execution may be determined by law, save that it must not be unusually barbarous or otherwise offensive.

83. **Indeterminate sentence.**—Although it is

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[19] In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930.

within the province of the courts to determine the guilt of a person accused of crime and to impose a punishment by way of sentence, it is not unconstitutional for the legislature to fix the punishment which may be imposed for a particular crime and in the regulation of the punishment imposed to provide that for good behavior while undergoing punishment the prisoner may be either paroled or discharged before the expiration of the period of imprisonment to which he is sentenced. It may also be provided that some executive board may determine the extent of the imprisonment to be required, not exceeding the term for which the sentence provides. Thus it is proper to authorize an indeterminate sentence within maximum and minimum limits and make the extent of the imprisonment dependent upon the findings of such executive board as to the character and previous conduct of the accused, as well as upon his conduct while in prison.

84. **Twice in jeopardy.**—There is usually a guaranty in state constitutions similar to that found in the Fifth Amendment to the Federal Constitution, that no person shall be twice put in jeopardy for the same offense; the general purpose of such guaranty being that an accused, having been once acquitted, shall not be again tried for the same criminal act or conduct, and that when he has once been convicted and a punishment imposed, he shall not be again tried for the purpose of imposing a different or additional punishment. The general rules of criminal procedure recognized in the courts have a broader scope, perhaps, than the constitutional guaranties require;

it being a well recognized rule that when a criminal trial has commenced in a court having jurisdiction to impose a punishment, the accused is entitled to have that trial proceed to its termination, and that when he has thus been put in jeopardy on one trial, he can not be subjected to another trial, no matter what may be the result of the first, unless he waives that result by asking a new trial on account of errors or irregularities committed on such first trial.

CHAPTER V.

DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW, AS AFFECTING PERSONAL AND PROPERTY RIGHTS—THE POLICE POWER.

85. **General purpose of Fourteenth Amendment.** —While specific constitutional guaranties are designed to prevent particular abuses in the exercise of the powers of government, there was not, until the adoption of the Fourteenth Amendment,[20] any general guaranty of liberty in its broadest sense involving personal freedom from restraint and the enjoyment of property. The guaranties of due process and equality found in the state constitutions as limitations upon state power and in the Fifth Amendment to the Federal Constitution as limitations upon federal power, were conceived of as preserving to the subject the protection against the arbitrary exercise of authority on the part of the executive branch of the government guaranteed by Magna Charta, which emphasized the supremacy of the law of the land over the will of the sovereign. But the guaranty in the Fourteenth Amendment as a limitation on the exercise of power by the states gave significant emphasis to the conception that legislative as well as executive power must be so exercised as not to result in a deprivation of individual rights. The purpose and effect is to declare that there are "certain immutable principles of justice which are inherent in the

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[20] See § 9.

very idea of free government which no member of the Union may disregard."[21] In this broader sense of constitutional protection, the Fourteenth Amendment properly relates to exercise of power by the states, for the federal government is one of limited powers, affecting in only incidental ways the fundamental rights of liberty and property.

86. **Applicable only to state action.**—The rights of the individual to enjoy liberty and property may be improperly infringed by other individuals; but as to such infringement no constitutional guaranty is necessary. The law of the land affords a remedy to the individual for injuries done or threatened to him by other individuals. The affording of such remedies is the very function of law in its usual sense and for the protection of his individual rights each person is left to the remedies which the law of his state provides. Therefore, although it is declared in the Fourteenth Amendment that Congress shall have power to enforce its provisions by appropriate legislation, it has been held that no authority is thus conferred upon Congress to legislate for the protection of individuals in their ordinary rights as against unjust and unlawful discriminations in their relations with other individuals.

"It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Fourteenth Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen* [empty threat], the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

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[21] Mr. Justice Brown, in Holden v. Hardy, 169 U. S. 366, at p. 389, 18 Sup. Ct. 383.

"Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."[22]

87. **Unequal administration of the law.**—But though the law of the state complained of as infringing the provisions of the Fourteenth Amendment "be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[23] And it was therefore held that a city ordinance conferring upon municipal authorities arbitrary power to determine who should engage in the laundry business, which power was exercised by refusing permission to Chinese subjects, while permission was granted under the same conditions to others, was invalid under the Fourteenth Amendment.

88. **Due process of law.**—From what has already been said as to the civil right to protection of life, liberty, and property,[24] it is apparent that the due process of law guaranteed in the Fourteenth Amendment as against state infringement refers in its broadest scope to something more than forms of procedure. "What constitutes that process, it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller, in Davidson v. New Orleans, to arrive at its

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[22] Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18.

[23] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064.

[24] See § 59.

meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (96 U. S., 97, 104.) It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."[25]

89. **Difficulty of definition.**—It is as impossible to accurately and fully define due process as it is to define law. In fact, the civil rights which the law recognizes can be infringed or taken away only so far as the general principles of law permit. The recognition of rights involves, as a necessary result, their protection by law, that is, by the law of the land which is the same in effect as due process of law. The significance of the guaranty of due process of law in the Fourteenth Amendment does not consist in affording a guaranty as to rights not already protected by law or preventing infringements which were not already

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[25] Hagar v. Reclamation District, 111 U. S. 701, at p. 707, 4 Sup. Ct. 663, at p. 667.

prohibited; but it consists in adding a federal constitutional guaranty to the guaranties already found in state constitutions. As is said by Mr. Justice Brown, speaking for the majority of the Supreme Court of the United States, in another case:

"This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that, in some of the states, methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

"The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states, grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority.

"This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in Hurtado v. California, 110 U. S., 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise.

"Similar views have been heretofore expressed by this court. Thus, in the case of Missouri v. Lewis, 101 U. S., 22, 31, it was said by Mr. Justice Bradley: 'We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its so doing. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state.' * * * We do not wish, however, to be understood as holding that this power is unlimited. While the people of each state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a state. Thus, the United States are bound to guarantee to each state a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several states, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."[26]

90. **Equal protection of the laws.**—The prohibition on state action denying any person the equal protection of the laws is, like the guaranty of due process of law referred to in the preceding paragraph, only a recognition of a characteristic of law itself. By law in the sense here referred to is meant general law, law of uniform application, which excludes the thought of arbitrary discriminations and special favors. It is not intended that the laws of the different states recognizing and protecting civil rights shall be the same. Each state prescribes its own system of law. By the Fourteenth Amendment, it was "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under

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[26] Holden v. Hardy, 169 U. S. 366, at p. 385, 18 Sup. Ct. 383.

like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

"From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike persons similarly situated, is not within the amendment."[27]

As due process and equal protection are both characteristics of law and the purpose of the Fourteenth Amendment was to guarantee protection of life, liberty, and property according to law as against any unwarranted infringement thereof by state action or state authority, no further separation of the guaranties afforded by due process and those afforded by equal protection need be preserved, and the following discussion of the powers of the different departments of state governments, so far as they are affected by the Fourteenth Amendment, has relation both to due process and to equal protection.

91. **Uniformity.**—In some state constitutions, there is a provision requiring that all laws shall be uniform in their operation, the purpose of which is substantially the same as that of the requirement as to equal protection of the laws. A law is uniform in its operation if, taking into consideration the proper

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[27] Barbier v. Connolly, 113 U. S. 27, at p. 31, 5 Sup. Ct. 357.

purpose of its enactment, it affects alike all persons who come within the situation and circumstances to which the law relates. For good reason there may be distinctions in the law as to localities or as to classes of persons on account of their callings or employments; but it is not proper by ostensible classification not founded on reason to impose restrictions upon some which are not applicable to others. For instance, taxation should be uniform and therefore without discrimination; nevertheless, the methods of taxing different classes of property may be varied, and exemptions in favor of particular classes of persons may be provided for. Inheritance taxes may be made to bear more heavily in proportion on large inheritances than on those which are smaller, and persons within specified degrees of relationship may be exempted entirely from the payment of such taxes. Statutes may be made applicable to cities of one class, dependent upon population, while not applicable to cities of a different class. Corporations engaged in business of a public nature may be subjected to regulations which are not applicable to those engaged in ordinary private business. In general, the discriminations prohibited are those not founded upon reasonable necessity, and the protection guaranteed is that of substance rather than of mere form.

92. **Legislation.**—As applied to legislative action, the requirements of due process and equal protection involve, first, the restriction of legislation within its proper functions; and second, its exercise subject to limitations. To provide by statute that the property

of one person shall pass to another or to determine the title to property so as to affect those who are already in ownership and enjoyment of it, or to regulate methods or forms of conveyance with the purpose of defeating the rights of those who have already acquired property in conformity to existing laws, is not within the proper function of the law-making power. To permit such legislation to be effectual would amount to an interference with property rights without due process of law. The laws should be prospective in their operation, and it is the function of the judiciary to determine the validity and effect of transactions already past. Retrospective legislation is valid only so far as it does not affect vested rights.[28] It is apparent, therefore, that not every act of legislation which has the form of law is valid.

"To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The Constitution, then, would mean that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or at least it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a preëxisting cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life."[29]

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[28] See § 115.

The words "due process of law" mean more under our system of government than their equivalent words, "the law of the land," meant in Magna Charta. "The concessions of Magna Charta were wrung from the king as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament. * * * The omnipotence of Parliament over the common law was absolute, even against common right and reason. * * * In this country, written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.''[80]

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[29] Mr. Justice Comstock, in Wynhamer v. People, 13 N. Y. 378, at p. 392.

93. **The police power.**—Within its proper scope, the subjects of legislative power are: first, to provide for the carrying on of the operations of the government in its legislative, executive, and judicial departments; second, to provide for the raising and expenditure of the revenues essential for such operation; and third, to control and regulate the conduct of individuals in the exercise of their general rights of life, liberty, and property so as to promote the general welfare. The last of these three classes embraces what is usually designated as the police power. It is the power most fundamental and essential, for it involves the very purposes of government. Briefly, it has been thus described: ``The police power may be defined in general terms as that power which inheres in the legislature to make, ordain, and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members, and to prescribe the mode and manner in which every one may so use and enjoy that which is his own as not to preclude a corresponding use and enjoyment of their own by others.''[81]

For convenience, the exercise of the police power inherent in the legislative department may be considered as involving three main branches: first, the protection of the government in its operations; second, the preservation and promotion of the peace, safety, health, and morality of the people as a whole and their enjoyment of the benefits of government and the advantages of those general benefits which accrue to them as members of the body politic; and third, the control over the enjoyment by individuals of life, liberty, and property, to the end that these rights shall not be so exercised as to interfere with the equal enjoyment of the same rights by others. These divisions are not exclusive, but will serve as a basis for illustrations of the extent to which the legislative power may be exercised without interference with the limitations of due process and equal protection.

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[80] Mr. Justice Matthews, in Hurtado v. California, 110 U. S. 516, at p. 531, 4 Sup. Ct. 111, Leading Illustrative Cases.

[81] Cooley, Principles of Constitutional Law (3rd ed.), p. 338.

94. **Preservation of government.**—The creation of a system of government of necessity involves all the safeguards reasonably necessary to its protection; therefore, the legislative power may properly provide for restriction of the exercise of private rights with a view to its proper preservation. Some acts are punishable as crimes because they would interfere with the proper operations of government and the discharge of its functions. On this principle, treason is made criminal. The interference with the action of officers in the discharge of their duties is prohibited, and the courts are authorized to deal in a summary manner with any one whose conduct tends to impair their efficiency or prevent their proper action. The necessity and justice of the exercise of this kind of police power is so manifest that further discussion would be superfluous. The only effects of the general limitation on legislative power are the

necessity for procedure in accordance with due form and a recognition of the principle of equality of rights.

95. **Preservation of public peace and good order.**—It is essential to the enjoyment of individual rights that there be a general preservation of social order among the members of the body politic and to this end, many classes of acts and conduct are made punishable although they may not directly tend to the injury of any particular individual or class of individuals. A considerable portion of the criminal law has relation to the prevention of acts and conduct of this character. Riots and disorders of various kinds are suppressed, public nuisances are abated and the dangers incident to improper assemblages and the carrying of concealed weapons are averted. On the same general ground are based laws for the suppression of vagrancy, and the prevention of disorderly conduct. Here again the manifest expediency and justice of the exercise of the police power is so fully recognized and legislation within the general scope of that power is so fully indicated that a fuller discussion and illustration seem superfluous.

96. **General public welfare involving the preservation of health and safety.**—The promotion of the public welfare, as suggesting a proper field for the exercise of the police power in the enactment of laws, is a well recognized function of government but perhaps too indefinite to be of particular value in the classification of its powers. Within that general field, however, it is well settled that laws may be properly enacted for the preservation of the physical health

and safety of the people. The sale of poisons may be regulated; the sale of unwholesome provisions may be prohibited; and in this connection the pure food laws may be suggested as a proper illustration although they relate to the prevention of fraud as well as to the impairment of the public health. And sanitary regulations of every kind are sustained as proper so far as they are reasonable and uniform in their operations. Thus, laws for the suppression of unsanitary conditions in tenement houses are sustained. The peculiar dangers to persons who are employed in mines, in the operation of railroads, in carrying on navigation by water, in operating factories, and in the use of dangerous machinery, justify the requirement of safety appliances and the maintenance of sanitary conditions. For the same reason, the hours of labor for women and children employed in stores or factories may be restricted. With a view to the future health of the contracting parties and of their offspring, restrictions are imposed upon marriage. Quarantine laws are enacted to prevent the admission of immigrants who are afflicted with contagious diseases. Indeed, the prevention of the spread of contagion is so important an object that local health authorities are empowered to quarantine persons afflicted or reasonably suspected of being afflicted with diseases that may be communicated to others. On this ground, compulsory vaccination is justified. The method of keeping and handling dangerous explosives is subject also to restrictive regulations. Buildings which become a source of danger to others than their owners may be condemned and if necessary to the public safety, destroyed.

Some vocations so directly involve the public health that persons who desire to pursue them must secure a special license to be granted only on proof of their fitness; within this class being the callings of physicians, surgeons, dentists, and pharmacists.[32] The limitation of due process and equal protection is applicable as to all this class of legislation for the purpose of preventing an undue and unreasonable restriction on the private rights of liberty and property.[33]

Another limitation to be observed is that state regulations of this character must not be such as to interfere with interstate commerce which is by the Constitution placed under the special control of Congress.[34] As a further illustration of the legislation in behalf of the general public health, it may be suggested that parks and playgrounds may properly be provided for at the public expense.

97. **Public morals and decency.**—Protection as to physical health and safety is not, however, the full scope of the protection which the members of society are justified in asking of an organized government. The preservation of the public morals and the prevention of conduct which is shocking to common decency and perhaps to some extent to the public taste may properly be afforded. In these matters, it has

[32] Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231.

[33] Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, LEADING ILLUSTRATIVE CASES.

[34] Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213. As to relations between state police regulations and interstate commerce, see subject, INTERSTATE COMMERCE.

always been a recognized function of government to prevent immoral conduct calculated to be injurious or offensive to others such as the keeping of houses of ill-fame, the indecent exposure of the person in public places, and in general licentious conduct. To the same end, the publication, sale, and exhibition of licentious and indecent books, papers, and pictures is prohibited. The posting in public places of indecent advertisements or placards comes within the same general category, and in some states, there are laws not necessarily unconstitutional which prevent the shock to good taste by unsightly or otherwise offensive advertisements and posters. Perhaps the so-called "flag legislation" prohibiting the use for private purposes of representations of the flag or other emblem of national significance falls within this general category. In this connection reference may properly be made to laws prohibiting unnecessary cruelty to animals, such as shocks the general moral sense and natural feelings of mankind.

98. **Business morality.**—In the general protection of the public in business dealings involving property rights, it has always been deemed proper to legislate for the prevention of fraud and the general protection of business and the private citizen in his property rights against fraudulent conduct. The use of false weights and measures is prohibited; pawn shops are regulated; and purely speculative transactions in the sale of corporation stocks, or produce are placed under the ban of the law by declaring such transactions to be invalid and prohibiting the carrying on of business of that character. Within the

same general category are laws prohibiting gambling and lotteries and declaring contracts of that character to be invalid. The usual legislation prohibiting or regulating and restricting the sale of intoxicating liquors is to be sustained on various grounds, involving health, morality, and decency. And on these same grounds laws requiring the cessation of business on Sunday and declaring invalid contracts made on that day, with certain necessary exceptions, are sustained.

99. **Freedom of contract.**—An interesting example of the proper exercise of the police power in the restriction of the civil rights of liberty and property is afforded by legislation interfering to some extent with the general right of each individual so far as he sees fit to make contracts in regard to personal services and the use of his property and in the promotion of his own welfare. The right to labor and to receive compensation for such labor is an essential characteristic of personal liberty. The right to contract as to the use of property is essential to the enjoyment of the property itself.

The liberty mentioned in the Fourteenth Amendment, which is guaranteed against interference therewith on the part of the states, "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[85] "Such liberty and right embrace the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good."[86] Therefore, legislation interfering with the validity of contracts voluntarily entered into between persons competent to make contracts is dependent upon the question whether there is any reasonable ground of public interest affecting such contractual relations.

In promoting the general health and safety of those engaged in the business of mining, for instance, it has been deemed reasonably expedient to require certain precautions with reference to ventilation and safety appliances. The employees in mines cannot, by contract, defeat the provisions made for their protection. And if some particular method of estimating the quantity of coal for which a miner shall be paid is provided by legislation, any contract inconsistent with such legislation will be invalid.[87] So, if on account of the nature of the employment or the circumstances under which services are required to be rendered, it is reasonably necessary to the protection of the health of employees that their hours of continuous employment be limited, contracts for employment in disregard of such restrictions are invalid.[38] But where there is no reason for discriminating between different employments on account of public health or security, an arbitrary regulation of the hours of labor which may be contracted for is void.[39]

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[85] Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427.

[86] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277.

[87] McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, LEADING ILLUSTRATIVE CASES.

Some forms of business are recognized as involving considerations of public policy justifying limitations on freedom of contract. Thus, usury laws limiting the rate of interest which may be agreed upon for the loan of money are universally sustained, the exaction of usury having always been treated as against public policy. The business of insurance is so far of a public nature that the terms of the contract or policy of insurance which the parties may agree upon, may be regulated by statute. There are strict provisions as to the methods of conducting the business of banking. And the business of carrying goods or passengers for hire is of such public nature that the carrier may be prohibited by legislation from contracting against such liability as arises in the nature of the employment and his rates of charge may be prescribed. Conspiracies and contracts in restraint of trade are also prohibited and in many of the states there are strict anti-trust laws which are enforced regardless of the contracts which parties may have entered into as between themselves. In short, freedom of contract like any other civil right is subject to legislative restriction on reasonable grounds in the furtherance of the general public welfare.

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[38] Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383.

[39] Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, LEADING ILLUSTRATIVE CASES.

100. **Protection to property.**—The legislature may properly have in mind, in exercising the law-making power to promote the public welfare, that private property should be protected so far as practicable against destruction or impairment. The ordinary legal remedies available to the owner of property against any one who without right interferes with his enjoyment of it or causes damage to or destruction of the property itself, need not be here enumerated for they are a part of the general law to which every person is entitled in the protection of his civil rights. But some general regulations tending to the protection and preservation of property fall within the proper scope of the police power. For instance, there may be public measures to prevent general damage to property by overflow or inundation; and on the other hand, public measures may be justified to regulate, preserve, and prevent the improper diminution of the water supply for irrigation and other purposes.

Regulations may also be adopted to prevent the setting out of fire on private property even by the owner, if peril to other property is thereby occasioned; and drastic provisions for the stopping of destructive fires in progress may be authorized even though the result may be to some extent the demolition of buildings for the purpose of limiting the area of the conflagration. Such destruction of property to stop the progress of a fire, if it is reasonably justified by the emergency, does not necessarily entitle the owner to any compensation or redress, for the public safety is a paramount consideration.

Other police regulations of the same character are those relating to the protection of the public against dangerous animals with a view to the preservation of property as well as to the safety of persons; and the suppression of public pests of various kinds which might be injurious to domestic animals or crops is justified. Landowners are sometimes required by law to prevent the growth of noxious weeds on their premises in order to avoid the danger of their spreading over the premises of others.

101. **Use of public property and natural resources.**—The whole public has some common interest in the preservation and use of property held by the state for the benefit of the people, or devoted to general public uses; and the public interest and use may, therefore, be properly regulated and protected. Not only may public buildings, parks, streets, and highways be so controlled as to preserve them for the public use to which they have been devoted, but the public forests may be preserved, navigation of public waters may be regulated, and the rights of hunting and fishing, so far as they may be exercised without infringement of private ownership, may be restricted for the preservation of fish and game.[40] Indeed, the natural resources may, to some extent, be preserved so that future generations shall not be deprived of the general benefit of such resources.

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[40] Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499.

102. **Sumptuary laws.**—Regulations for the protection of public health, safety, and morals are sometimes spoken of as sumptuary laws which are proper in the protection of the public. But here a distinction must be borne in mind between interference with private conduct which is injurious or obnoxious to others and such conduct as is thought to be injurious to the individual himself. It is not within the proper scope of legislation to protect the individual against the consequences of his own acts and the exercise of his own judgment with regard to his own welfare. In general it is not competent to provide for compulsory benefits to the individual alone concerned. Thus, Sunday laws are not enacted to prevent the individual himself from transgressing his religious obligations, or the intoxicating liquor laws intended to prevent the improper use of liquor so far as it may be injurious to the individual. Regulations of vice relate to immoral conduct affecting others and the suppression of speculation is for the protection of others rather than the person whose own lack of judgment is concerned. These restrictions are justified only when they prevent one person or class of persons from conduct of life or business affecting other people.

Sumptuary legislation in its obnoxious sense has not been unknown and so far as the attempt has been to prevent mere extravagance of living, it has usually been condemned as not within the proper scope of the police power. "Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the state and to his fellows. The state cannot substitute its judgment for his as to the use he should make of it for his own advantage. Neither can the state regulate his dress or his table, except so far as may be needful for the protection of morality and decency. State laws prohibiting the sale of liquors to be drunk on the dealer's premises have the public interest in view, and are justified on that ground. And laws prohibiting women to appear in public in the customary garb of men would be supported, not as a regulation of fashion, but as regulations to prevent practices likely to lead to serious abuses, and to be resorted to for the worst purposes."[41]

103. **Federal police power.**—It has already been suggested that in general the police power is vested in the states rather than in the federal government.[42] The promotion of the general public welfare is not placed under the control of the federal government. The phrase "public welfare" employed in enumerating the powers of Congress,[43] only designates one of the purposes for which Congress is given power to lay and collect taxes. Nevertheless, in the exercise of the express and implied powers conferred upon the federal government, that government may take into account the public welfare as a motive or purpose properly to be kept in mind. Thus, the suppression of lotteries as injurious to the public, is not one of the proper functions of federal legislation; but

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[41] Cooley, Torts (3rd ed.), vol. II, p. 614.

[42] See §§ 86-93; also, Part II, §§ 3-5.

[43] U. S. Const., Art. I, § 8, par. 1.

in the exercise of the express powers to regulate interstate and foreign commerce and to provide postal facilities, Congress may enact laws tending to suppress lotteries by prohibiting the transportation from one state to another or from foreign countries to the United States of lottery tickets and may exclude from the mails newspapers containing lottery advertisements. Similar regulations are properly made applicable to indecent and immoral publications.

In the regulation of the postal service, Congress has prohibited the use of the mails by persons or corporations in the promotion of fraudulent schemes tending to the injury of the general public; and in the regulation of interstate commerce, it has been deemed proper to prevent the use of the facilities of such commerce for the purpose of evading the game and fish laws of the various states. In regulating the instrumentalities of interstate and foreign commerce, Congress has properly provided for the use of safety appliances on railroad trains and for the inspection of ships employed therein and it has in the exercise of the same power regulated the relation of master and servant so as to impose on the carrier while engaged in interstate commerce, liability for the negligence of a fellow servant for which, at common law, there was no liability, and deprived the carrier of the common law defense of contributory negligence save by way of reduction of damages;[44] and it has restricted the power of common carriers to limit their liability for loss of goods beyond their own lines where goods have been accepted for transportation over connecting lines.[45] While many difficult questions have arisen as to the extent to which Congress may legislate within the scope of its express and implied powers for the furtherance of the general public welfare, the distinction between the powers of Congress in this respect and the powers of the state legislature has never been lost sight of; and the principles on which the distinction is based have been fully recognized.

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[44] Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141.

104. **Function of the courts as to cases of police power.**—The police power which has been above described is vested in the legislative department of government and not in the executive department or in the judiciary; but the question whether in attempting to exercise this power the legislature has in any particular case exceeded the general powers of legislation or has violated some constitutional limitation, can be determined by the courts when presented in a proper case. In deciding such a case, it is not for the courts to pass on the general expediency or effectiveness of the legislation called in question, but only to determine whether it is valid. Such legislation will be sustained if on any ground it appears to be within the scope of the police power and not an infringement of constitutional limitations; for the legislature is under no obligation to explain its purposes or motives in the enactment of laws. The choice of methods for accomplishing a proper object must also be regarded as within its discretion. It is not for the courts to interfere with such discretion

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[45] Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164.

so long as the constitutional limitations on the exercise of the power are not infringed.

Taking, for illustration, the state legislation for the regulation of railroad rates, the functions of the court in passing upon the validity of such legislation becomes plain. The first question to be decided in logical order would be whether a state statute regulating rates of carriage is within the police power; for, in general, the prices at which commodities shall be bought and sold and the charges under contract relations for services rendered are not subject to legislative regulation, and a statute imposing such regulation would not be within the general scope of legislative power and, therefore, would be an attempt to deprive persons concerned of their liberty and property without due process of law. But the police power does extend to the regulation of rates of charge by those engaged in what are known as public callings and who devote their property to such public use. Therefore, a statute regulating or prescribing the rates of public carriers is constitutional.[46] The policy of such legislation, that is, the question whether the public welfare requires the exercise of the power of legislation, conceding that the subject is one proper for legislation, cannot be inquired into by the courts. The legislature may regulate railroad tariffs without any provision in regard to rates of transportation by water, or by other land carriers such as express companies, for the reasonable judgment of the legislature as to the necessity of regulation is not to be interfered with. A classification of carriers by which some are subject to regulation while others are left free will not amount to a denial of the equal protection of the laws to those regulated, provided the distinctions relate to some reasonable ground of classification. Furthermore, discriminations in rates between different classes of goods will be proper if the classification is apparently based on some distinction with reference to the nature of the service rendered.

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[46] Munn v. Illinois, 94 U. S. 113, LEADING ILLUSTRATIVE CASES.

But a question may further arise as to whether the rates fixed do not amount practically to a confiscation of the property employed in the form of transportation regulated; for it is plain that to compel the performance of services without compensation would be an interference with liberty and to deny any compensation for the use of property devoted to a public use would, in effect, be to destroy the value of such property.[47] The courts must determine, therefore, whether the rates fixed by the legislature afford a reasonable compensation for the use of the property employed.[48]

Still another question may arise, however, in determining the validity of a state statute regulating railroad rates. The transportation of goods is commerce and the power to regulate interstate and foreign commerce is vested in Congress;[49] and any regulation of a state directly affecting interstate commerce must, therefore, be invalid as an infringement upon a power expressly vested in the federal government. From this it follows that state regulation of railroad rates cannot be applicable to the transportation of goods from one state to another or between any state and a foreign country.[50]

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[47] Railroad Commission Cases, 116 U. S. 307, at p. 331, 6 Sup. Ct. 334.

[48] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418. The considerations to be taken into account in determining the value of the property as a basis for estimating the reasonableness of the rates fixed, has been the subject of much discussion in later cases; but while that question is of great practical importance, it is not of special interest in reaching a conclusion as to the power of the courts to review legislative action.

[49] U. S. Const., Art. I, § 8, par. 3. See Part II, § 31; also, subject, INTERSTATE COMMERCE.

105. **Executive department.**—In applying the limitations of due process of law and equal protection of the laws to the executive department of a state or the federal government, it is important to bear in mind the relations of the executive to the law-making power. Some of the functions of government are directly vested in the executive department. That department is charged in general with the enforcement of the law and in it is vested the military power. It does not necessarily act by appeal to the courts nor depend for its authority upon express provisions of statutes. Nevertheless, it does not make the law, but only enforces it and, therefore, it is largely dependent as to the scope of its action with reference to any particular subject matter and its method of procedure on the general regulations prescribed by legislation. In dealing with such subject matter and in the methods of its procedure, due process of law does not require that it pursue the course prescribed for judicial action by the courts. The regular and lawful methods of executive action which constitute due process of law, are not the same as those essential for judicial action. Thus, the legislative department may authorize, in proper cases, the taking of property for public use and may confer

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[50] Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4.

authority on the executive department to proceed in such cases without resort to the courts, although it is usual to provide also for a final appeal to the courts in determining the extent of compensation to be awarded.

106. **Taxation.**—A more pertinent illustration is that of the exercise of the power of taxation. When the legislative department has authorized the exercise of this power, the proceedings for the levying and collection of the taxes imposed are usually left to the executive department, although it is within the jurisdiction of the court to determine whether the power is lawfully exercised and in a particular case regularly administered. It is not essential to due process of law, however, that in the levying and collection of taxes duly authorized, the procedure be in accordance with the forms of judicial procedure. Many officers, boards, and tribunals which act in the collection of the taxes and the expenditure of the revenues derived from taxation, act according to the usual methods appropriate to such cases by resort to "summary remedies without the aid of the usual course of judicial proceedings" and such course is "due process of law within the meaning of that phrase as derived from our ancestors and found in our Constitution."[51]

107. **Pardons.**—Another illustration may be found in the exercise by the chief executive of the pardoning power, expressly vested in him by our constitutions. This power the executive may exercise

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[51] Davidson v. New Orleans, 96 U. S. 97. And see Kelly v. Pittsburg, 104 U. S. 78.

in accordance with any course of procedure and upon any grounds deemed by him sufficient without pursuing methods of ascertaining and determining the facts which are essential in judicial procedure, subject only, perhaps, to general regulations prescribed by the law-making power; and his action within the scope of his authority is not subject to review in the courts.

108. **Administration of alien exclusion acts.**—Another illustration of the principle that executive action within its proper scope may be due process although the methods of judicial procedure are not observed, is found in the administration of statutes excluding from the country aliens of particular classes specified by statute. Congress has vested the authority to administer these laws in executive officers and tribunals which proceed in accordance with administrative and not judicial methods, and their action is not subject to review in the courts. Even in determining whether the person seeking admission to the United States is a citizen and, therefore, not subject to exclusion, or an alien who in accordance with the provisions of the statutes may be excluded, the action of the administrative tribunals is conclusive.[52]

109. **Subordination of military to civil power.**—Although the supreme military power is vested in the executive department which acts absolutely and beyond control in determining the emergencies requiring action and the methods of its actions so far as

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[52] United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, LEADING ILLUSTRATIVE CASES.

they are the usual methods of exercising military authority, nevertheless, so far as the civil rights of individuals are concerned, the military is subordinate to the civil authority. This is essential to the fundamental conception of law and therefore essential to due process of law. The courts martial administering the military law as affecting persons in the military or navy service, may proceed in accordance with their own proper rules and are not required to adopt the methods of judicial tribunals; but on the other hand, their action does not exclude the general jurisdiction of the civil courts, and without regard to the military law, officers and others in the military service may be held responsible in the civil courts for their action, subject only to the limitation that if they have properly acted in accordance with the exercise of the military authority, they are not to be held in the civil courts to have committed any wrong.

110. **Suspension of habeas corpus.**—The supremacy of the civil over the military authority is emphasized by the recognition of the common law right of inquiry by judicial officers into the interference with personal liberty on the part of military officers by proceedings in habeas corpus; with the result that if a court or judge in such proceeding finds that in the attempted exercise of military authority, a person has been improperly and unwarrantedly deprived of his liberty, his further imprisonment under such military authority may be terminated. The exception recognized in our constitutions is that the privilege of the writ of habeas corpus may be suspended only when in case of rebellion or invasion, public safety

may require it.[53] But it is necessarily implied that the privilege shall be suspended only so long as the emergency justifying its suspension continues.[54]

111. **Due process in judicial proceedings.**—The functions of the judicial department of the state or the federal government are exercised by courts and the proceedings of the courts in accordance with the usual forms of judicial procedure and with the usual limitations in determining questions involving life, liberty, or property, constitute due process of law. Such proceedings are usually employed in a controversy in which one party invokes the authority of the court to render a judgment in his favor against another party complained of as having infringed or denied some right or privilege of the party complaining. In criminal cases, the state acts as the complainant asking that punishment be imposed upon the accused for violation of the criminal law. But beyond the power to decide specific cases or controversies thus submitted to it, a court may also have authority to administer justice in summary proceedings within proper limits and for a proper purpose. Thus, a court may, in a summary proceeding, exclude an attorney from the practice of his profession for misconduct, even though the right of an attorney to practice may be considered in a proper sense as a property right; and the decision of a court in such proceeding depriving an attorney of this property right is due process of law although in form it is not in accordance with the usual course of procedure in ordinary

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[53] U. S. Const., Art. I, § 9, par. 2. There are similar provisions in state constitutions.

[54] Ex parte Milligan, 4 Wall. 2 (U. S.), Leading Illustrative Cases.

cases or controversies. It is a regular and lawful method of procedure practiced from time immemorial.

As indicated in a preceding section,[55] due process of law does not necessarily involve trial by jury. And speaking of the summary procedure to disbar an attorney for acts which were criminal in their nature and for which he might have been indicted and put on trial before a jury, the Supreme Court of the United States has said: "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty, administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[56]

112. **Jurisdiction in personam.**—Nevertheless, the usual exercise of judicial power in accordance

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[55] See §§ 65, 89.

[56] Ex parte Wall, 107 U. S. 265, at p. 289, 2 Sup. Ct. 569.

with the requirements of due process of law involves the submission of a case or controversy to a court which has jurisdiction of the subject matter and the parties. The court must be one constituted in accordance with law and authorized by law to decide the case or controversy submitted to it; that is, it must be a court having jurisdiction of the subject matter. But more than that, in view of the fundamental rule of judicial procedure that no person should be bound by a decision affecting his rights without having had his day in court, it is essential that the defendant against whom relief is asked by way of judgment or decree in the case or controversy shall have been brought within the jurisdiction of the court; in other words, it is essential that the court shall have jurisdiction of the person. Such jurisdiction is acquired in criminal cases by the arrest of the accused or by some proceeding equivalent to an arrest; and in civil cases, it is acquired by the service of process or by some equivalent form of notice which obligates the defendant to appear and subject himself to the jurisdiction of the court with an opportunity to be heard. Mere consent of the parties will not confer upon a court jurisdiction of the subject matter, for that depends upon the nature of the court and the subject matter, which are determined by law. Parties may agree to a settlement of their controversies and they may even refer them to private individuals for arbitration, but they cannot of themselves constitute courts authorized to render binding judgments enforcible by legal process. Officers who attempt to act on the authority of what purports to be a judgment or decree must see to it that such judgment or decree is one rendered by a court having jurisdiction. But so far as the jurisdiction of the parties is concerned, that may be conferred by consent. Thus as every person is entitled to resort to the courts for the protection of his rights, one who institutes a proceeding in a court having jurisdiction of the subject matter to have his rights determined, gives the court authority to proceed in the proper manner for the determination of his case.

Likewise, the one against whom relief is asked in a court having jurisdiction of the subject matter, may submit to the jurisdiction of the court over such a case, so far as he is concerned, by a voluntary appearance; that is, by going into court personally or by duly authorized attorney and consenting that the case be tried by that court. But it is evident that the jurisdiction of a court to proceed cannot depend on the voluntary submission by the person against whom relief is asked; for, if that were so, the court would be helpless to furnish relief against an unwilling defendant. By compulsory process or by personal notice giving to the defendant the opportunity to appear and defend in the case, the court may acquire jurisdiction. The form of process or the kind of notice which will be sufficient may be determined by law within the reasonable scope of the purpose to be attained; that is, to afford to the defendant a reasonable opportunity to be heard.

But one of the most important results of the guaranty of due process of law is that unless the defendant resides within the territorial jurisdiction of the court or is personally served with notice within such jurisdiction, he cannot be required to submit his case to the court for decision. The powers of the court must necessarily be limited by the territorial boundaries of its jurisdiction. Therefore, there is no method by which a non-resident of the state who does not come within its limits can be required to submit to the jurisdiction of the courts of such state, and a personal judgment rendered without such jurisdiction is of no validity, for its enforcement would deprive the defendant of his property without due process of law. "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.''[57]

113. **Jurisdiction in rem.**—There is, however, a well recognized class of cases in which a court may render decisions in accordance with due process of law without having jurisdiction of the person whose rights are to be affected. These are cases in which a court at the instance of a complaining party has caused property found within the limits of its territorial jurisdiction to be seized and proceeds to determine its ownership or to subject it to the payment of liens or to appropriate it to the satisfaction of the claims of the owner's creditors. To this extent, a court may act without having personal jurisdiction of the owner or claimant of the property. A proceeding of this kind is said to be in rem and the judgment of the court is valid so far as it affects the property which has thus been seized; but a personal judgment cannot be rendered.

To the extent of determining rights to the property thus brought under its jurisdiction, the court exercises the sovereign power of the state which ''has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, in subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice."[58]

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[57] Pennoyer v. Neff, 95 U. S. 714, at p. 733.

Even in such cases, something by way of notice which will reasonably enable the owner or claimant of the property to appear and defend his rights is usually provided for; but he may properly be expected to take notice of the seizure of his property and come into court within a reasonable time to defend his rights if he desires to do so. "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look after any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligation of the defendant, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability."[59]

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[58] Arndt v. Griggs, 134 U. S. 316, at p. 320, 10 Sup. Ct. 557.

For similar reasons to those above suggested in regard to property rights, the status of a person who is a resident of a state may be determined by the courts of that state even though the determination of such status may affect the rights of others who are not residents of the state and who do not appear in court and are not served with notice within the state. Thus it is held that a divorce may be granted to one who is in good faith a resident of the state although the other party to the marriage relation is not a resident and is not personally served with notice within the state.[60]

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[59] Pennoyer v. Neff, 95 U. S. 714, at p. 727.

Another illustration of jurisdiction in rem is the exercise of power by a proper court under authority of law to distribute the property of an absentee which is found within the state, after the lapse of such time as to justify the reasonable conclusion that the owner is dead. Such distribution is in accordance with due process of law although it may subsequently appear that the owner was not in fact dead at the time such distribution was made.[61]

114. **Binding effect of judgment of courts having jurisdiction.**—Another result of the application of the principle of due process of law to the adjudications rendered in courts having jurisdiction, is that judgments thus rendered are conclusive on the parties over whom the court has acquired jurisdiction in personam, and as to the rights of all persons in property with reference to which a judgment in rem has been properly rendered. It is of the very essence of judicial procedure that the rights involved in litigation shall be finally determined, subject only to such review on appeal as may be provided for by law. The jurisdiction of the court rendering a judgment may be subsequently inquired into, even col-

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[60] Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525.

[61] Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. 721.

laterally, but when it is found that the court rendering a judgment had jurisdiction, the correctness of such judgment cannot be subsequently reinvestigated save by appeal taken within the time and in the method authorized for appeals. To deprive a person who has duly litigated his case of the benefit of such litigation would be to deny him the right without due process of law.

115. **Vested rights protected.**—In determining what are property rights of which a person cannot be deprived without due process of law, it is convenient to use the term vested rights as distinguished from mere prospective or uncertain expectations. The term is not used in the Federal Constitution nor generally in state constitutions, but it is frequently employed by the courts in determining whether state legislation amounts to a deprivation of property; the general proposition being that a state legislature cannot impair vested rights although it may restrict or regulate the future transfers or disposition of property. Thus as to transactions in the future, legislation regulating the methods and effect of conveyances, the making of wills, the inheritance of property of intestates, the allowance of dower to the widow on the death of her husband, and the creation of interests in husband and wife, respectively, in the property of the other while living, is valid. A prospective heir has no vested right in the property of a living person; neither has a wife a vested right during her husband's lifetime to a share in his property after his death.

From what has been said about forms of procedure in relation to due process of law, it is apparent that even as to property rights which are vested, there is no vested right in any particular remedy or method of redress. The civil right of protection of liberty and property by due process of law only means that a reasonable protection be afforded and that there be some method for redressing an invasion of rights. A good illustration is that of statutes of limitation which prescribe periods of time within which different forms of actions shall be brought. Even after a wrong has been done which gives rise to a right of action, the legislature may change the statute of limitations as to that form of action so as to shorten the period allowed for bringing it, provided a reasonable time is preserved within which existing rights of action may be prosecuted. But after a cause of action has become barred, it is doubtful whether legislation is valid as to that action which so extends the period of limitation as to revive the remedy.

116. **Retrospective legislation.**—It is only, therefore, where vested rights are impaired that retrospective or retroactive laws are prohibited. The prohibition as to ex post facto laws, as already pointed out, relates only to criminal prosecutions.[62] Civil rights are held subject to legislative regulation under the police power.[63] There is no vested interest in the continuance of the common law. A mere common-law regulation of trade or business may be changed by statute. "Rights of property which have been created by the common law cannot be taken away without due

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[62] See § 70.

[63] See § 93.

process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."[64] Therefore, the fact that the value or the enjoyment of property already owned at the time is affected by a law passed in the proper promotion of the public welfare does not amount to an infringement of vested rights without due process. "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."[65]

Thus by way of illustration, it has been held that property which has been used in the manufacture and sale of intoxicating liquors may be impaired by enactment of laws regulating or prohibiting the sale of such liquors without interfering with any vested rights.[66] "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer."[67] Likewise, it has been held that a statute prohibiting lotteries is applicable to a lottery enterprise carried on under a franchise previously granted.[68]

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[64] Munn v. Illinois, 94 U. S. 113, at p. 134, LEADING ILLUSTRATIVE CASES.

[65] New York, etc., R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437.

[66] Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273.

[67] Beer Co. v. Mass., 97 U. S. 25, at p. 32.

Bearing in mind, therefore, that retrospective legislation is invalid only where it impairs vested rights, it is clear that legislation which changes existing conditions even to the inconvenience or disadvantage of those who have relied upon the law as it existed when the property was devoted to a particular use, is entirely constitutional. And it is further apparent that mere public or political rights are always subject to legislative change. Thus, in general, offices may be abolished, the qualifications for the elective franchise may be altered, the acts of municipalities, corporations, or official bodies may be validated where there has been a mere irregularity in their exercise, and even defects in the acknowledgment or recording of conveyances may be cured so far as the effect of the curative act is only to carry out the purpose of the conveyances, if no right of property has subsequently been acquired in reliance upon the defect in the prior conveyance. When retrospective statutes "go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law," the question as to the propriety of the legislation is one of policy and does not involve constitutional power.[69]

On the other hand, legislation is in its nature prospective rather than retrospective, and in the absence of some plain indication that a statute is to be given retrospective operation, it will be construed as applicable only to the future.

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[68] Stone v. Mississippi, 101 U. S. 814.

[69] Cooley, Constitutional Limitations (7th ed.), p. 535.

CHAPTER VI.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

117. **State legislation prohibited.**—One of the few prohibitions on state action found in the Federal Constitution, as originally adopted,[70] is that forbidding any state to pass any law impairing the obligation of contracts. As it has been applied, this prohibition is perhaps more far-reaching than its framers anticipated; but on the whole the results of its practical application have been satisfactory in that it has tended to promote stability and security in business; for the very essence of business security is the sanctity of contract obligations. The primary purpose of the prohibition was no doubt to prevent the repudiation, by the states forming the Union, of their own debts and obligations; and the applicability of the prohibition to public obligations is to be first considered.

118. **Public debts and their incidents.**—A sovereign state or public or quasi corporations created by the state are bound by contracts made within the scope of their authority as fully as an individual is bound by his private contracts, and to repudiate such an obligation either by attempting to annul it or by failing to perform it according to its terms would be an attempted impairment of its

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[70] U. S. Const., Art. I, § 10, par. 1. There are similar limitations in state constitutions upon the powers of state legislatures.

obligation such as is prohibited. In general, a sovereign state may not be sued in its own courts without its consent, nor in the federal courts;[71] and therefore, if a state should see fit to violate its constitutional obligation to pay its debts, its creditors would be without legal redress. But where warrants, bonds, or other written obligations have been issued under a law providing that they shall be receivable in payment of taxes, the state legislature cannot deprive the holders of such instruments of the right to have them thus received; for the attempted legislation depriving them of this incident of value is in violation of the constitutional prohibition, and must be disregarded by the taxing officers to whom they are tendered in accordance with the original provisions for their issuance.[72] As to public corporations and quasi corporations, there is no such difficulty, for as to them legal remedies are available to their creditors and any legislation impairing their obligations is invalid.

119. **What are contracts of the state?**—But, while public obligations on the part of the state are created by or in pursuance of statute, it is not every statute which gives rise to a contract obligation. It has already been said[73] that there is no vested right in the continuance of the common law unchanged or in the continued existence of a statute which the legislature has authority to repeal. Many statutory provisions which may have been relied upon in the acquisition or use of property are merely regulations which

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[71] Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504.

[72] McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972.

[73] See §§ 93-102.

the legislature may change at its will, although such change may prove detrimental to property interests. Thus, exemptions from taxation, the ordinary exemption laws in favor of poor debtors, the homestead laws, laws providing for bounties, and many other statutory privileges are to be regarded as privileges only, which may be modified or repealed by the legislature at will without ground of complaint on the part of those who but for the modification or repeal would have been entitled to take advantage of them.

On the other hand, it is perfectly competent for the legislature, acting presumptively for the public interest, to enter into express contractual relations as to taxes or exemptions, and if the elements of a contract are present, that is, if there is something in the nature of a specific proposal on a consideration of direct advantage to the state which is accepted and acted upon, the obligation becomes of such binding character that it cannot be impaired. The rule of construction, however, is that a binding contractual obligation will not be presumed unless it is necessarily implied from the language of the statute in view of the circumstances under which it was enacted, and the courts are reluctant to assume that the state legislature has attempted by contract to limit itself in the exercise of its general powers of legislation.

120. **Charter contracts.**—The grant of a charter to a corporation or the creation of a corporation under statutory provisions authorizing its organization and the exercise of the powers assumed by it is regarded as in the nature of a grant, the consideration for which is the formation and continuance of

the corporation in reliance on such grant. Therefore, it was held in the famous Dartmouth College Case[74] that the granting of a charter to a corporation constituted a contract on the part of the state which could not be subsequently impaired by amending or repealing the provisions of the charter. In the creation of a corporation "the purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on government to provide for them; and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake."[75] These decisions and others announcing the same principle have been the subject of some criticism on the ground that a legislature ought not to be able to impair or abridge the powers of subsequent legislatures, and on the further practical ground that they contemplated and authorized the creation of an artificial person having greater protection against future legislative action than a natural person may possess.

121. **Limitations on charter contracts.**—But in at least two essential features the doctrine of the Dartmouth College Case has been practically restricted:

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[74] Dartmouth College v. Woodward, 4 Wheat. 518 (U. S.), LEADING ILLUSTRATIVE CASES.

[75] In re Binghampton Bridge, 3 Wall. 51 (U. S.).

First, by statutory or constitutional provisions with reference to corporations to be created in the future, that their charters shall be subject to legislative modification or repeal; and second, by the full recognition of the principle applicable to private persons that corporate rights are subject to police regulation. "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."[76] Thus, although a railroad corporation may have been created and endowed with the power to carry goods and passengers at such rates as may be fixed by its officers, the general police power of the legislature to regulate rates of all carriers may be exercised with reference to it. So it is held that existing provisions of the general law as to taxation do not become a part of a charter so as to prevent a change in such general law which shall be applicable to the corporation provided in the charter.[77] By statutes creating corporations "no rights are taken from the public or given to the corporation beyond those which the words of the charter by their natural and proper construction purport to convey."[78] It is also to be borne in mind that charters granted to public or quasi corporations are not in any sense contracts, and may be amended at the discretion of the legislature.[79]

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[76] Stone v. Mississippi, 101 U. S. 814.

[77] Wisconsin & Mich. R. R. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107.

122. **Private contracts.**—As between private individuals, the obligations of a binding contract can not be impaired without a violation of the constitutional prohibition. The question of what is a contract binding between the parties to it, must be determined by the general rules of law with reference to the parties, the place, and the subject-matter; but assuming that contractual obligations have been entered into, they are protected against impairment by legislation. Of course, the validity of the contract itself will depend on the law as it existed when the contract was made; so that the constitutional prohibition plainly refers to legislation which is retrospective in its effect. The legislature can no more interfere with vested rights under a contract than it can with vested property rights. In the first case decided by the Supreme Court of the United States construing the constitutional prohibition,[80] it was held that the prohibition applied to executed as well as executory contracts and protected the rights of parties acquired by a conveyance of land, treating the conveyance as an executed contract. In view of the later adoption of the Fourteenth Amendment to the Federal Constitution, prohibiting states from depriving any person of his property without due process of law, this early

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[78] Proprietors of Charles River Bridge v. Warren Bridge, 11 Pet. 420 (U. S.).

[79] East Hartford v. Hartford Bridge Company, 10 How. 511 (U. S.).

[80] Fletcher v. Peck, 6 Cranch 87 (U. S.).

decision has become immaterial, for after a contract is fully executed, the rights acquired under it are property rights. The important effect of the prohibition now is to protect vested rights in executory contracts. Such rights may be impaired by attempted legislation which declares a contract already made, and lawful when made, to be unlawful, or by depriving parties of any remedy for its enforcement or substantially impairing the remedy which existed at the time the contract was made and which may reasonably, therefore, be construed to have been a part of the contract.

123. **Police power as to executory contracts.**—It is plain that the legislature cannot annul a valid contract already made; but, on the other hand, contract rights as well as property rights are subject to the proper exercise of the police power; and in the exercise of that power a legislature may prohibit the doing of the very thing which a contract already made provides for. Thus, it would be unlawful to sell intoxicating liquors otherwise than as authorized by law, or to carry on a lottery in violation of a statute prohibiting lotteries, although the doing of such acts might have been agreed upon in a prior valid contract. By such legislation, the obligation of the contract is not impaired and the parties may have such remedies as are available to them, but they can not insist that the contract be performed in violation of valid statutory regulations in existence at the time when performance is called for.

124. **Impairment of remedy.**—The questions usually arising in regard to impairment of the obligation

of private contracts are as to the denial of an adequate remedy for contracts which are valid when entered into, and it is held that while the legislature may change forms of procedure and to some extent regulate remedies, it cannot do so in a manner affecting existing contracts if the result is to deprive a party to the contract of any remedy for the protection of his rights under it. "The right to a particular remedy is not a vested right. This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains."[81] Thus, the legislature may change the provisions of the Statute of Limitations so as to affect the remedy on existing contracts, provided it leaves a reasonable time within which to enforce a right under the contract. It may change the rules of evidence; but not to such extent as to render incompetent any evidence of an existing contract. It may in general change the remedy as to exemption of property from execution or the redemption of property from judicial sale; but it cannot enlarge such exemption or extend the period of redemption so as to substantially impair the remedy of the creditor under an existing contract by providing for exemptions which remove beyond the reach of the creditor property which could otherwise have been subjected to the payment of his claim or extend the time of redemption to his disadvantage. The laws in accordance with which a party to a contract is entitled to a remedy for its breach are "as perfectly binding on the other party, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. * * * Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition," relating to appraisement, exemptions, and redemption, impairs the obligation of the contract.[82]

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[81] Cooley, Constitutional Limitations (7th ed.), 515.

125. **Judgments as contracts.**—It is usual to speak of a judgment in a court as a contract of record; but a judgment is not of itself such a contract as is referred to in the constitutional prohibition. If the judgment is a part of the remedy for a contract obligation, its validity cannot be impaired without impairing the obligation of the contract on which it is founded; but if it is a part of the remedy afforded with regard to rights which are not rights of contract, nor rights of property, it is subject to legislative regulation. Thus, a judgment for damages resulting from personal injuries for which the law may have afforded a remedy at the time of the commission of the wrong is neither a contract nor a property right, and the legislature may regulate the method of its enforcement without impairment of a vested right.

126. **Changes in rules of judicial decision.**—The prohibition against impairing the obligation of con-

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[82] McCracken v. Hayward, 2 How. 608 (U. S.). And see Gunn v. Barry, 15 Wall. 610 (U. S.).

tracts relates to legislative action. The decisions of courts are binding in the cases in which they are rendered, so far as they affect the rights of the parties to those cases of which the courts have jurisdiction; but so far as these decisions are relied upon as precedents for the decision of other cases, they constitute only expressions of views of the courts for similar cases. No party to a contract has any vested right in the mere precedents announced by the courts in previous cases. Therefore, while a party in making a contract may have assumed that the rules of law affecting his rights are as announced by the courts in the decision of similar cases, he has no vested right in such rules of decision.

127. **Limitation not applicable to federal government.**—It is to be noticed that the provision in the Federal Constitution relating to impairment of the obligation of contracts prohibits only such impairment by the states. There is no similar provision relating to the action of the federal government itself. Therefore, statutes of Congress are not subject to the same test as to their validity in this respect as are state statutes; and the objection that a federal statute passed in the exercise of some express or implied power results incidentally in the impairment of contract obligations is of no force. Thus Congress, in the exercise of its power to regulate the currency, may determine what shall be legal tender in the payment of debts, and such a provision cannot be questioned on the ground that contract obligations already existing are thus modified or infringed.[83] A state

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[83] Trebilcock v. Wilson, 12 Wall. 687 (U. S.).

may not pass a bankruptcy law which relieves debtors from their obligations under previously existing contracts, or which discharges the debts of a resident of the state to non-resident creditors;[84] but Congress is expressly given authority to enact bankruptcy laws, and the discharge of a debtor in pursuance of the provisions of such laws is perfectly valid even as against his obligations contracted before the passage of the law on which he relies.

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[84] Sturges v. Crowninshield, 4 Wheat. 122 (U. S.).

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CONSTITUTIONAL LAW

PART IV

EMINENT DOMAIN

BY

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CHAPTER I.

THE LIMITS OF THE POWER.

1. **Eminent domain defined.**—Eminent domain is the power, inherent in a sovereign state, to take or to authorize the taking of any property within its jurisdiction for the public use. When a private individual, no matter how wealthy or powerful he may be, desires to acquire a large tract of land for his own purposes, he is obliged to negotiate with the owners of the land, and the owner of a single parcel may lawfully block the whole transaction by refusing to sell at all, or he may set an unreasonable price for his land which the prospective purchaser must pay or abandon his project. The state is under no such disability. If it requires property for the public use, it may take it, whether the owner is willing to sell or not, and while it must pay for what it takes, it need pay only the fair value, without regard to the price the owner may have set.

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The power to take and wipe out of existence the homes and shops and farms of any of the people when the necessity arises is essential to the successful performance of most of the functions of the government of any people not wholly uncivilized or nomadic, and is a power inherent in every sovereign state; but it is a power so fraught with possibilities of abuse and injustice that the people of this country have been unwilling that the legislature should exercise it without restriction, and in the constitution of almost every state in the Union there is a provision that property shall not be taken for public use without just compensation. The United States is subjected to a like restriction contained in the Fifth Amendment to the Federal Constitution. In addition to the specific provision already noted, the Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of his property without due process of law, and it is settled that the due process clause, besides giving protection against arbitrary forms of procedure, prohibits the taking of property for a use not public or without compensation.[1]

2. **The power limited by the jurisdiction.**—No state can take property that is not within its jurisdiction or lawfully authorize an act which results in the destruction of property situated in another state.[2] A state cannot exercise the power of eminent domain within a district ceded to the United States and it

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[1] Fallbrook Irrigation District v. Bradley, 164 U. S. 112; Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226.

[2] Missouri v. Illinois and Chicago District, 180 U. S. 208.

cannot take property used by the United States government for public purposes.[3] The United States may take land within a state for federal purposes, such as post offices, forts and light houses, without the consent of the state,[4] but it cannot take the property of a state used for public purposes unless such property is absolutely necessary for the use of the United States.[5]

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[3] United States v. Chicago, 7 How. 185 (U. S.); Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525.

[4] Kohl v. United States, 91 U. S. 367, LEADING ILLUSTRATIVE CASES.

[5] Stockton v. Baltimore, etc., R. R. Co., 32 Fed. 9.

CHAPTER II.

WHAT CONSTITUTES A TAKING.

3. **Actual deprivation a taking.**—A taking of land within the meaning of the Constitution such as will entitle the owner to compensation may be effected without formally divesting him of the fee or of any easement, or turning him out of possession. All authorities are agreed that a "taking" is effected within the meaning of the Constitution, and the owner must be paid, if he is actually deprived of all beneficial use of his land, as by permanently submerging it with water, or turning great quantities of sewage upon it, or even making it uninhabitable by smells or noise,[6] or if actual occupation is made of part of his property as by building a ditch through it or a bridge or an elevated railroad over it, or a tunnel under it.[7] Constitutional rights rest on substance, not on forms; on facts, not on words; and when an owner is deprived of the use of his property for the benefit of a public improvement, it is taken from him and appropriated to public uses as truly as if it had been condemned under the usual forms of law. Some courts have gone so far as to hold that any use of adjacent land, which is so injurious as to be actionable at common law as a nuisance, if not

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[6] Pumpelly v. Green Bay Co., 13 Wall. 166 (U. S.); Cogswell v. New York, etc., R. R. Co., 103 N. Y. 10, 8 N. E. 537.

[7] White v. Cincinnati, etc., R. R. Co., 34 Ind. App. 287, 71 N. E. 276.

authorized by statute, is a taking of the owner's right to be free from such injury, and is consequently a taking of his property within the meaning of the Constitution if authorized by statute;[8] but the weight of authority is in favor of the rule that the property itself must be taken, either formally or in substance, to give the owner a constitutional right to compensation.[9]

In many states, however, the constitutions provide that property shall not be "taken or damaged" for public use without compensation, and in most of the other states it is customary, when a statute is enacted authorizing the construction of a public improvement, to insert a provision that all persons suffering damage in their property shall be compensated, so that cases of great hardship do not frequently arise of special and peculiar damage for which the law gives no remedy. Of course great loss is often inflicted upon private owners by the construction of an undesirable public work in the neighborhood of their property, or by the removal of a desirable one; but an even greater damage is more often inflicted by private parties, for which the law gives no remedy, as by the construction of apartment houses or garages in a residential district, or by closing a factory in which a large part of the community is employed; and in a like case there is no just claim against the public.

4. **The rights in a public way.**—The provision of

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[8] Eaton v. Boston, etc., R. R. Co., 51 N. H. 504.

[9] Transportation Co. v. Chicago, 99 U. S. 635, LEADING ILLUSTRATIVE CASES.

the Constitution prohibiting the taking of property without compensation has been most frequently invoked in connection with what are called "additional servitudes" in public highways. Ordinarily, when a public highway is established, the public acquires merely a right of way, an easement or servitude as it is called, and the owner retains the fee or ultimate title to the land within the limits of the way, subject to the public right of travel.[10] The public has no rights other than that of passage, and individuals who, for example, play ball in the streets, or maintain lunch wagons at fixed stands for long periods, even with the consent of the public authorities, are trespassers, and can be sued as such by the owner of the land.

The public easement, however, is not limited to travel on foot and in ordinary carriages, or by such means of conveyance as were known when the way was established. Individuals may, for example, unquestionably ride in automobiles upon public ways without violating the rights of the owner of the fee, although the burden on his land may be greater than was anticipated when the way was established. The public has in an ordinary highway the easement of travel with all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public and every reasonable means of transportation or transmission of persons or matter upon, above or beneath the surface of the ground.

When a new use is sought to be made of a public highway under authority of a statute, the primary question is whether such use is fairly within the rights of the public as above described. If it is an exercise of the highway easement, even if it inflicts serious injury upon the owner, it is not a taking of his property, because it is the exercise of an easement or servitude which has already been taken and paid for when the way was established and which need not be paid for again. If it cannot fairly be considered an exercise of the highway easement even if it is not a serious injury to the owner it is an actual entry upon and use of his property not justified by the existing rights of the public; in other words, it is an attempt to impose an additional servitude upon his land, and he is entitled by the Constitution to compensation.

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[10] Perley v. Chandler, 6 Mass. 455.

The exact extent of the highway easement is a matter of local substantive law, and it may well vary in the different states. The owner of the land retains the right to make any use of it not inconsistent with the public right of way as actually exercised. The trees and herbage are his and he may project his cellars and vaults under the highway if he does not interfere with public travel, but he gains no prescriptive right by his own use, and when the exigencies of public travel require him to give up portions of the highway which he has long enjoyed, he is not entitled to additional compensation.[11]

5. **Change of grade.**—It is well settled that when a highway is raised or lowered in grade by the public authorities so that it may be made safer or more con-

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[11] Deshong v. New York, 176 N. Y. 475, 68 N. E. 880; Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. D. 116, 75 N. W. 898.

venient for public travel, the abutting owner is not entitled to compensation.[12] The real reason for this rule is not that the damage is not so severe as to amount to a taking of property, but that the right to grade and construct the highway then or at any future time in such a manner as the public authorities might deem conducive to safe and convenient travel was taken and paid for when the way was first laid out and need not be paid for again. This public right has been held to include the cutting down of a way to such an extent that the soil of the adjoining lots falls in, but not the filling of a way in such a manner that the earth slopes upon the adjacent land; and the public easement includes the right to prepare the way for special forms of travel, and even to construct a way at two levels if both are used for general travel.

6. **Steam railroads.**—The ordinary railroad extending from town to town and carrying freight and passengers in trains drawn by steam locomotives, running on raised rails and stopping only at stations a considerable distance apart, is an additional servitude as a matter of law when constructed upon a public highway.[13] Although such railroads are unquestionably a form of public travel, they exclude all other traffic from the space that they occupy, either by the manner their tracks are constructed or by the reasonable fear of collision due to the great speed of such trains and their inability to turn out or to stop

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[12] Callender v. Marsh, 1 Pick. 418 (Mass.); Sadlier v. New York, 185 N. Y. 408, 78 N. E. 272; O'Connor v. Pittsburgh, 18 Pa. St. 187.

[13] Williams v. New York Central R. R. Co., 16 N. Y. 97.

quickly. Moreover, by reason of their weight, length and noise and the smoke, steam and cinders which they emit, they inconvenience other traffic upon the remainder of the street and inflict a damage upon adjoining property differing in kind rather than merely in degree from that inflicted by other highway uses without a corresponding benefit from increased accessibility other than that shared by the entire community.

7. **Street railways.**—The rule in regard to street railways proper is that they do not constitute an additional servitude upon the highway. The first street cars were drawn by horses. The rails were flat and were laid so as not to incommode other travel; the cars were small, few in number, carried passengers only and stopped at every street corner. The change from the old-fashioned omnibus was not so great that the courts were inclined to consider the new method of travel an unreasonable use of the public ways.[14] It having become well settled that horse railways were within the highway easement, no legal distinction was drawn when the cars gradually became more and more numerous and thereby excluded other traffic from the space between the rails, or when cars of the same type and carrying the same class of passengers, but propelled by electricity, were introduced.[15] In a few years, however, the rapid development of electric railways raised more difficult questions. The cars became larger, faster and more numerous. Often

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[14] Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62.

[15] West Jersey Ry. Co. v. Camden Ry. Co., 52 N. J. Eq. 31, 29 Atl. 423; Howe v. West End St. Ry. Co., 167 Mass. 46, 44 N. E. 386.

spaces in the street were reserved for them, to the exclusion of other traffic, and finally interurban electric railroads were introduced differing from steam railroads only in motive power and in the absence of long, unsightly freight trains. In some of the state jurisdictions an interurban electric railroad when constructed upon a public highway in such a way as to exclude other traffic from a portion of the way has been held by the courts to constitute an additional servitude.[16]

Elevated railroads, whatever their motive power, and railroads laid upon trestles in the middle of a street, are clearly additional servitudes,[17] but an underground railway, or subway or tunnel for passenger travel, does not interfere with the use of the street for ordinary purposes or deprive the abutting owners of light and air and may be constructed in a street without compensating the owners of the fee.[18] The fact that the abutters can no longer maintain cellars and vaults under the street is not a legal damage for reasons already stated.

8. **Pipes and wires.**—It is generally considered that pipes may be laid beneath the surface of a highway for the purpose of supplying the public with the necessities and conveniences of life without compensating the owner of the fee. The exercise of this right does not materially interfere with public travel and

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[16] Kinsey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922; Younkin v. Milwaukee, etc., R. R. Co., 120 Wis. 477, 98 N. W. 215.

[17] Story v. New York Elevated Ry. Co., 90 N. Y. 122, LEADING ILLUSTRATIVE CASES; DeGeofroy v. Merchants' Bridge Term. R. R. Co., 179 Mo. 698, 79 S. W. 386.

[18] Chicago v. Rumsey, 87 Ill. 348; Sears v. Crocker, 184 Mass. 586, 69 N. E. 329.

inflicts little if any injury on the land outside the limits of the way. The easement of a highway includes every reasonable form of transmission of matter, and liquids may be as lawfully transmitted by pipes underground as by tank wagons on the surface of the way. Sewers, water pipes and gas pipes are consequently not additional servitudes.[19] As to overhead wires there is considerable difference of opinion. Electric light wires for lighting the streets are clearly unobjectionable, as their principal object is to make travel on the streets safe and convenient;[20] but wires for transmitting electricity to private buildings and telephone and telegraph wires must depend for their justification upon the fact that they do transmit matter and that the injury upon abutting property is not severe. The poles, however, exclude other traffic from the space that they occupy, they injure the adjoining land to some extent at least and the matter that they transmit is not tangible and resembles but remotely and indirectly the subjects of ordinary highway travel. Furthermore, there is a direct conflict of authority on the question as to whether or not such poles and wires can be maintained in a public highway without paying compensation to the owner of the fee.[21]

9. **Country roads and city streets.**—A distinction has been drawn in some jurisdictions between city streets and country roads, and certain uses which

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[19] New England Tel., etc., Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

[20] Palmer v. Larchmont El. Co., 158 N. Y. 231, 52 N. E. 1092.

[21] American Tel. etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 910; Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N. W. 111.

are held proper for city streets have been held to constitute additional servitudes upon country roads.[22] It has never, however, been actually held that a community, however rural, which desires to supply itself with the conveniences of city life, such as sewers, water or gas, should be deprived of the use of its own public ways, but the use of the highways in a sparsely settled neighborhood has been denied an undertaking of no benefit to the community through which it passes or to the abutters upon its highways, but which seeks to secure the transmission of matter from one distant point to another without paying for the right of way. In most states the rights of the public in a highway are held to be the same throughout the state regardless of the density of population.[23]

10. **Fee in the public.**—It is not universally the case that a highway is only an easement, and it not infrequently has happened that a city or town has bought or retained the outright ownership of land used for a street. Until comparatively recent times the ownership of the fee of a city street was thought a barren and useless title and few owners knew or cared whether their line went to the center of the street or not. When, however, steam railroads and elevated railways were introduced into the public streets, and abutting owners were awarded compensation on the ground that their land was being used in a manner not justified by the easement to which it was subject, it seemed a great hardship to deny

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[22] Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 24 N. E. 1066; Eels v. American Tel., etc., Co., 143 N. Y. 133, 38 N. E. 202.

[23] Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; McDevitt v. People's Nat. Gas Co., 160 Pa. St. 367, 28 Atl. 948.

compensation to other abutters who had suffered equal damage but who had no title to the land within the limits of the street. While logically it is not easy to see why a city or town that buys and pays for a strip of land cannot use it for any purpose for which a private individual might lawfully use it, the hardship of such a rule seemed so severe that many courts have held that when a highway is established in which the public owns the fee there attach to the abutting lands easements of access, light and air from the street which are "taken" in the constitutional sense by any use of the street not justified by the usual highway easement, and consequently in jurisdictions in which this rule prevails, the relative rights of the public and of the abutting owner are substantially the same, regardless of the ownership of the fee.[24]

11. **Other public easements.**—Most of the decisions relating to additional servitudes arose in connection with public highways, but when land is taken for any other public purpose the rule is the same, and, if the fee is retained by the owner, the easement taken extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land is taken and to no other.[25] When a railroad company has acquired the easement to use a strip of land for railroad purposes it may change the grade and erect stations, freight houses and similar structures,[26] but it cannot lawfully erect buildings

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[24] Story v. New York Elevated Ry. Co., 90 N. Y. 122, LEADING ILLUSTRATIVE CASES; De Geofroy v. Merchants' Bridge Term. R. R. Co., 179 Mo. 698, 79 S. W. 386.

[25] Brainard v. Clapp, 10 Cush. 6 (Mass.).

[26] Elyton Land Co. v. South, etc., R. R. Co., 95 Ala. 631, 10 So. 270.

for purposes not incidental to the more convenient operation of the railroad.[27] It may, for example, maintain a restaurant for employees and passengers, but not a hotel for the use of the general public. For parks, schoolhouses and public buildings generally, if the fee is not actually taken, an exclusive right which is the practical equivalent of the fee passes to the town and deprives the owner of all beneficial enjoyment while the public use continues.[28] Thus, he retains only a possibility of reverter in case the land is no longer used for the purpose for which it was taken.

12. **Injury to outside land.**—If the owners of adjacent land are entitled to receive compensation for the injury that will result from the construction and operation of a public improvement when it is first laid out, the public agency in charge of the work acquires the right to inflict upon such adjacent land, then or at any future time, the injuries that result naturally from the construction and operation of the work in a reasonable manner without making any further compensation when such injuries are actually inflicted.[29]

13. **Discontinuance.**—The discontinuance of a public work does not of itself entitle the owner of adjoining land to compensation.[30] When, however, the only highway or other means giving access and outlet to a certain parcel of land is not only discon-

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[27] Lance's Appeal, 55 Pa. St. 16.

[28] In re Harlem River Bridge, 174 N. Y. 26, 66 N. E. 584.

[29] Flagg v. Worcester, 13 Gray 601 (Mass.).

[30] Smith v. Boston, 7 Cush. 254 (Mass.); Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 417, 5 N. E. 353.

tinued, but is at the same time physically obstructed by some other public work, the owner is in substance not only deprived of all beneficial use of his land, but the resulting injury is so severe as to amount to a taking.[31]

14. **Waters and water rights.**—The questions arising from the taking of waters and from injury to water rights depend largely upon the substantive law defining the relative rights of the public and of the individuals owning land adjoining the body of water affected. Water courses and bodies of water are either public or private. All water courses are public as far as the ebb and flow of the tide are felt and in many states the title to the bed of large fresh water streams and ponds is also in the public. The legislature may authorize the use of public waters for any public purpose without compensating individuals thereby injured in their property[32] except that it is generally held that a riparian owner has a right of access from his bank to the channel of the stream, which cannot be cut off by the construction of a railroad or other public work in front of his land without compensation.[33] The owner's rights, however, are subordinate to navigation and to the right of the public authorities, state and federal, to construct works in aid of navigation, even if they wholly cut off the access to riparian land.[34] In most states a riparian owner has the right to erect wharves in

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[31] Brakken v. Minneapolis, etc., Ry. Co., 29 Minn. 41, 11 N. W. 124.

[32] Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 18 N. E. 465.

[33] Rumsey v. New York, etc., R. R. Co., 136 N. Y. 543, 32 N. E. 979.

[34] Gibson v. United States, 166 U. S. 269; Sage v. New York, 154 N. Y. 61, 47 N. E. 1096.

front of his land, and the wharf and the land covered by it become his absolute property.[35] The legislature may authorize the waters of a public water course to be diverted, or polluted with sewage, without compensation to the riparian owners.[36]

In a private water course the only absolute public right is that of navigation, if the stream is navigable. The diversion of the water constitutes a taking,[37] and a pollution with sewage so serious as to constitute a nuisance it has been held cannot be authorized without compensation to the riparian owners.[38]

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[35] Illinois Central R. R. Co. v. Illinois, 146 U. S. 387.

[36] Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 18 N. E. 465; Sayre v. Newark, 60 N. J. Law 361, 45 Atl. 985.

[37] Gardner v. Newburgh, 2 Johns. Ch. 162 (N. Y.), LEADING ILLUSTRATIVE CASES; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781.

[38] Platt Bros. & Co. v. Waterbury, 72 Conn. 351, 45 Atl. 154; Grey v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749; but see Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062.

CHAPTER III.

WHAT CONSTITUTES PROPERTY.

15. **Every interest is protected.**—When there is a taking by eminent domain every person holding any estate or interest in the subject-matter of the taking is entitled to compensation. The word "property" in the Constitutions of the United States and of the various states is construed as to include every valuable interest that can be enjoyed as property and is recognized as such.[39] When the land taken is occupied by tenants, both the landlord and the tenants are entitled to compensation for the injury to their respective interests, although the aggregate compensation should not exceed the fair value of the property. The nature of the different estates in a particular parcel of land and contracts between the owners of the various interests therein cannot affect the public right to take the land by eminent domain, or enlarge the duty to make compensation beyond the value of the land itself.[40] Persons holding land by adverse possession under claim of right are entitled to compensation for the injury to their interests when the land is taken by eminent domain. The owners of easements or rights in the nature of easements in the land taken are also entitled to share in the compensation.

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[39] Stubbings v. Evanston, 136 Ill. 37, 26 N. E. 577; Old Colony, etc., R. Co. v. Plymouth, 14 Gray 155 (Mass.).

[40] Burt v. Merchants' Ins. Co., 115 Mass. 1.

In those jurisdictions in which a mortgage is held to constitute merely a lien, the mortgagee is not constitutionally entitled to compensation when the mortgaged land is taken for public use, but merely has the right to follow the award in equity, and the same is true of liens generally; but in those states in which a mortgage is held to pass the title to the land, the mortgagee is entitled under the constitution to receive compensation to the extent of his interest. The matter is now generally governed by statute so as to fully protect the rights of both mortgagor and mortgagee. The wife's right of dower is property after the husband's death, even before assignment, but the inchoate right of dower before the husband's death is not property in the constitutional sense.

16. **Fixtures.**—Personal property may of course be taken by eminent domain, but a taking of real estate does not include the personal property lying on the parcel taken. It does, however, include buildings affixed to the land and other fixtures, even though as between landlord and tenant they constitute personal property.[41]

17. **Owner at time of taking considered.**—It is the owner at the time of the taking who is entitled to compensation, and if a parcel of land is sold after a portion of it has been taken or after the land has been injuriously affected by the construction of some authorized public work, the right to compensation does not run with the land but remains a personal claim in the hands of the vendor. A person who has a valid agreement for the purchase of land which

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[41] In re Water Front, 192 N. Y. 295, 84 N. E. 1105.

could be enforced by a court has, it would seem, an equitable interest in the land which should be treated as property if the land is taken for public use before the time set for conveyance. If an owner dies before the date of the taking the right to compensation passes to his executors or administrators and will not be included in a devise of the real estate taken. If the taking was not completed until after his death, his heirs, or, if he left a will, the devisees of the land taken, are entitled to the compensation.[42]

18. **Franchises.**—A franchise which carries obligations as well as privileges constitutes a contract, when accepted, which is protected by the constitution, and unless in terms revocable it can be taken, abrogated or infringed only by the exercise of the power of eminent domain and upon payment of compensation.[43] A franchise, however, that is not in terms exclusive may be constitutionally impaired in value without compensation by the subsequent grant of a similar franchise to other parties.[44]

19. **Property of a city or town.**—The property of a city or town which it holds merely as an agency of the state for the benefit of the public at large, such as its streets, parks and police stations, is not protected by the constitution, and the legislature may authorize such property to be taken for the public use without compensation;[45] but the property which a city or town holds for the benefit of its own inhabitants or as a partly commercial enterprise, such as

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[42] Nichols, Power of Eminent Domain, chap. 35.

[43] Dartmouth College v. Woodward, 4 Wheat. 518 (U. S.).

[44] Charles River Bridge v. Warren Bridge, 11 Pet. 420 (U. S.).

[45] Higginson v. Treasurer, etc., of Boston, 212 Mass. 583, 99 N. E. 523.

waterworks, lighting plants, markets, cemeteries and libraries, cannot be taken from it without compensation.[46]

20. **Public service corporations.**—A public service corporation which has acquired private land by eminent domain or otherwise and devoted it to the public use is within the protection of the Constitution, although if such a corporation holds only an easement the imposition of another public easement on the same land does not entitle it to compensation unless actual damage is inflicted.[47] A public service corporation authorized to maintain rails, pipes or wires in a public highway gains no easement in the soil, but merely a revocable license, and may be required to yield its privileges without compensation whenever they conflict with other public needs.[48]

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[46] State v. Fox, 158 Ind. 126, 63 N. E. 19.

[47] Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226.

[48] Chicago v. Rothschild, 212 Ill. 590, 72 N. E. 698.

CHAPTER IV.

THE PUBLIC USE.

21. **Property cannot be taken for private use.**—It is well settled that property cannot be taken by eminent domain except for the public use. Although a taking for a use not public is not in terms prohibited in the constitution of any state, the provision that property shall not be taken for the public use without compensation has been held to prohibit by implication a taking of property for a use not public even upon payment of full compensation. A taking of property by authority of a state for a use not public is also a taking without due process of law and a violation of the Fourteenth Amendment of the Federal Constitution.[49] The constitutions of some of the states in terms authorize the taking of land for certain purposes not generally considered public, and the courts of other states have upheld takings even in the absence of specific constitutional authority for purposes which in the absence of peculiar local conditions would not be thought proper objects of eminent domain. A person whose land is taken for such purposes may appeal to the federal courts, and if he satisfies them that his land has been turned over to another without his consent for private use he will be given relief, even if the taking is authorized by the constitution of the state, for of course the Federal

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[49] Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

Constitution is the supreme law of the land; but the United States Supreme Court has frequently asserted that what constitutes a public use depends so much on local conditions that it will not overturn a taking made under authority of a law sanctioned by the constituted authorities of a state, with their intimate familiarity with the necessities of their own people, except in a case which admits of no other conclusion than that no public use was intended to be subserved.[50]

22. **Public use defined.**—Public use is not easy of definition. "Use" has two meanings, "employment" and "advantage," but neither of these words expresses the meaning of "use" as interpreted by the courts in construing the clause of the constitution now under consideration. Eminent domain is not limited to such undertakings as are actually employed and used by the public; but on the other hand, it cannot be invoked on behalf of every undertaking that can fairly be said to be of advantage to the public. Historical considerations affect the question, and in deciding in a given case whether the object falls on one side or the other of the line the courts must be governed to some extent by the usage of the past. Whatever is sanctioned by time and the acquiescence of the people, especially if it was known and accepted when the constitution was adopted, may well be held to belong to the public use.

The tendencies which have shaped public opinion and the development of the law upon this subject are somewhat as follows. First, the uses which seem least public but which are considered proper subjects for eminent domain were exercised upon wild land in which the feeling of exclusive proprietorship was not highly developed. Second, courts have been more ready to sustain as public a particular undertaking when it was of such a character that it would be difficult or impossible to carry it out without the exercise of eminent domain. Third, public convenience and material needs have been looked upon more favorably than mere amusement or aesthetic enjoyment. Fourth, the courts are less strict when the taking is to be made by the state or by a city or town than when it is to be made by a private corporation. Fifth, the question as it presents itself to the courts is not whether the purpose for which the property is taken is a public one but whether the legislature might reasonably consider it a public one, and every presumption is in favor of a taking authorized by the legislature of the state.

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[50] Clark v. Nash, 198 U. S. 361; Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527.

23. **Use of the government.**—The United States, a state or a municipal corporation may unquestionably be authorized to take land on which to carry on its proper public functions. Land may be taken for all sorts of public buildings, such as a courthouse, capitol, city hall, schoolhouse, customs house or public library and for navy yards, forts, armories, arsenals and military camps.[51] It is immaterial that the site required is small and a particular situation is not important, so that the land could readily be acquired by purchase. If the use is public, eminent domain may be employed.

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[51] Kohl v. United States, 91 U. S. 367, LEADING ILLUSTRATIVE CASES.

24. **Public service.**—Besides the uses already mentioned which affect the public as members of an organized government but which as individuals they may not be permitted to enjoy, there is the vast class of takings made for the purpose of furnishing each member of the public who may require them the necessities, conveniences and pleasures of life. The power of eminent domain may for such purposes be delegated to cities and towns, or to private corporations, and the use by the public may be with or without a charge; but it is almost always held necessary that the public have the right to make use of the commodity or the convenience furnished, and that it be of a nature requiring the exercise of the power of eminent domain to adequately meet the public needs.

Highways upon which every member of the public has the right to travel may be laid out by the exercise of eminent domain. The reason for which people may wish to travel, the amount of probable use and the motive of the authorities in laying out the way are not questions for the courts, and the taking of land for a highway for pleasure travel only, for a road that leads to the house of but one individual, or for a street whose principal object is the development of vacant territory violates no constitutional rights.[52] Private roads, constructed at the expense of individual landowners, may be laid out by eminent domain if open to the public; otherwise not.[53] Turnpikes and toll-roads open to the public use on payment of a fee constitute a form of public way and may be laid out by eminent domain.

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[52] Higginson v. Nahant, 11 Allen 530 (Mass.); Summerfield v. Chicago, 197 Ill. 270, 64 N. E. 490.

[53] Sadler v. Langham, 34 Ala. 311; Sherman v. Buick, 32 Cal. 241.

Steam railroads acting as common carriers of passengers or freight are clearly a public use—but there have been some difficulties regarding private railroads and spur tracks connecting private factories or mines and business establishments with railroads. The tendency is to treat such tracks as appurtenances of the railroads, especially when the statutes provide that the public may use them, and although this privilege is seldom availed of, it has generally been held sufficient to justify the exercise of eminent domain. Spur tracks which the public has no legal right to use have been held a public use in some jurisdictions, but the contrary rule is not without support and is, logically at least, the sounder.[54] Railroad companies may be authorized to take by eminent domain, in addition to their right of way and land outside their right of way for purposes incidental to the construction of a safe roadbed, land for stations and for freight yards and for other purposes connected with the complete enjoyment by the public of the facilities of travel and transportation; but it has been held that land cannot be condemned solely for the convenience of the railroad company for such purposes as car factories, and in the case of an electric railroad, for a power house at a point several miles distant from the tracks.[55]

The power of eminent domain may be employed for the improvement of rivers and harbors, or for the creation of a wholly artificial system of navigation by means of canals, or to acquire landing places for public ferries. It may be employed for the taking of streams and ponds and for the laying of pipes to furnish the public with water for such needs as are fairly incidental to living in cities and large towns.

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[54] Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199; In re Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506; Maginnis v. Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300.

[55] In re Rhode Island Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590.

25. **Distribution of commodities.**—In general, eminent domain may be employed to aid in the distribution of any commodity which the public requires but which cannot be conveniently and economically supplied without the exercise of eminent domain or the use of the public streets, such as gas or electric light. Constitutional questions are bound to arise when it is desired to distribute, to all who choose to apply for it, some commodity, necessary or convenient to the public, but which does not require pipes or wires for distribution. It has been held that private property may be condemned by a city or town for public markets in which stalls are leased by the municipality to individual dealers, but ordinary dealings in provisions and fuel have not hitherto been thought matters proper to be taken out of the hands of private venders. If, however, by reason of impending famine or of changed or unusual economic conditions, numerous deaths from cold or starvation could be avoided in no other way, it would seem within the constitutional power of the state to step in and seize the supply of fuel or food from the owners who were unable or unwilling to dispose of it to the public, and thus avert the impending calamity. If eminent domain can be employed for obtaining a supply of

water and light, it may be used when necessary for food and heat.[56] But, as far as decided cases go, and excepting markets which have the sanction of ancient usage in occupying public squares, from the point of view of the consumer no enterprise is public unless a commodity, useful to him as one of the public and which he has the right to receive without discrimination and at a reasonable rate, is delivered to him by means of pipes and wires which cannot be laid without the exercise of eminent domain or the use of the public streets. Beyond that the courts have not gone, and the legislatures have not yet attempted to go.

26. **Public pleasure.**—Slightly different questions arise in deciding whether a use is public which satisfies no material needs but gratifies the artistic sense of the public or supplies means for public pleasure and recreation. It was formerly felt that no person should be required to part with his property for purposes of public pleasure or aesthetic satisfaction alone, but this doctrine has been gradually swept away, so that while courts are perhaps less liberal in sustaining a use as public which does not affect the public in a material way, it is universally recognized that the gratification of the senses may constitute a public use. Parks have been gradually developed far beyond the original notion of breathing spaces in the congested parts of populous cities which were justified by considerations affecting the health and comfort of a dense population, and it is settled that such development is legitimate. Parkways for pleasure travel may be laid out and large

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[56] Opinion of the Justices, 182 Mass. 604, 66 N. E. 25.

parks outside the city limits, and vast tracts of uninhabited woodland, or spots made beautiful by nature may be taken for the public use, and the whole site of a famous battle may be reserved, although pleasure, sentiment and the love of the beautiful are the only purposes subserved.[57] When an attractive park, square or boulevard has been established, an easement may be constitutionally imposed by the exercise of eminent domain upon neighboring land preventing any use which will disfigure the surroundings and thus neutralize the benefit derived from the public expenditure.[58]

27. **Assistance of private enterprise improper.**— It may be laid down as a fundamental rule that it is not one of the proper functions of a constitutional government to directly assist private enterprise. Under ordinary conditions the power of eminent domain cannot be constitutionally employed to enable private individuals to carry on their business or to cultivate their land to better advantage, even if the prosperity of the community will be enhanced by their success. The establishment of a large factory furnishing employment to hundreds of hands might be of the greatest material benefit to a community, but it is well understood that even if the only available site is owned by one who capriciously refuses to part with it at any price, the power of eminent domain cannot be invoked to overcome his objections. The building of a new department store is often made

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[57] Shoemaker v. United States, 147 U. S. 282; Adirondack Ry. Co. v. New York, 176 U. S. 335.

[58] Attorney-General v. Williams, 174 Mass. 476, 55 N. E. 77.

difficult by the necessity of buying up outstanding leases in a great number of old rookeries occupying the projected site, and although public sentiment may look upon the new construction with great favor the right of the holders of the only unpurchased lease to extort an unconscionable price from the promoters of the project is a right protected by the constitution.[59]

28. **Dominating industries.**—Manufactures and commerce can be and ordinarily are carried on without the aid of eminent domain, but in certain sections of the United States the prosperity or even the very existence of the community depends upon the success of a particular industry which could not be carried on at all if the absolute rights of private property recognized elsewhere could be asserted. It is familiar law that as soon as this country was settled the public right of navigation on navigable watercourses above the ebb and flow of the tide was recognized, and that as soon as the West was occupied the common law doctrine of riparian rights in the use of the water of a running stream was discarded as inappropriate to the local conditions. In a like manner it was found that unless ditches and drains and private roads could be constructed across private property in certain parts of the country, the land was useless for agricultural purposes; and other sections depending wholly upon mining or lumbering could not be developed without similar subordination of private rights. In such states either by the decisions of the

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[59] Brown v. Gerald, 100 Me. 351, 61 Atl. 785; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629.

courts or by constitutional amendment the taking of property to aid in such enterprises was held to constitute a public use, and the Supreme Court of the United States has held that under such conditions there is nothing in the Fourteenth Amendment which requires it to interfere.[60]

29. **The mill acts.**—Another exception to the rule that private enterprise cannot be aided by eminent domain is found in the fact that almost everywhere throughout the United States a person owning land upon both sides of a running stream is authorized by statute to construct a dam across the stream for mill purposes though the lands of owners further up the stream are thereby permanently submerged, provided he compensates them for their injuries. When this country was first settled grist mills and saw mills were almost, if not quite, an absolute necessity to the community, and the miller was bound by law or custom to serve all who applied. In the absence of any constitutional restrictions the mill acts were generally accepted without discussion as necessary and wholesome legislation, and when the constitutions were adopted in the original states it was not supposed that it was intended that such laws should be invalidated. It was not until later that mills for mechanical purposes became common, but they were not excluded from the benefits of the mill acts, and when the constitutionality of the statutes was challenged in some notable cases in which it was sought to create power ample for a whole manufacturing

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[60] Clark v. Nash, 198 U. S. 361; Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527.

community, it was held that the public benefit to be derived from the establishment of the manufactories was sufficient to constitute a public use.[61] The newer states, adopting the same constitutional provisions, interpreted them in the same way, and mills for all purposes and of all sizes have been allowed to flood the lands situated above them.

Several courts have followed the earlier decisions with reluctance and a few have held that under present economic conditions the mill acts are unconstitutional.[62] The reasoning by which the mill acts were supported proves too much, and as it is not carried to its logical conclusion and manufactories in general are not held to be a public use, the mill acts raise an unjust discrimination between water power and power created in other ways, defensible only upon historical grounds.

In Massachusetts and some other states it is held that there is no taking of property by eminent domain under the mill acts.[63] Under a branch of the police power of the state when property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition and the parties interested cannot agree upon a scheme for the more advantageous use of the property, the law often provides a way by which they may compel one another to adopt measures necessary to secure its beneficial enjoyment, making just compensation to any of the proprietors whose control of the property or interest therein has been disadvantageously affected by the new arrangement. The exercise of this power is in most instances upon property held in common, as in the statutes providing for the repair of houses, mills and wharves, the employment of ships, the partition of land, the construction and maintenance of party walls and the government of the proprietors of private ways and bridges and common fields, but the principle is the same if applied to a tract of land affected by common necessities and interests although divided into parcels held by individual owners in severalty. A running stream and the adjacent lands are looked upon as such a tract, capable of a valuable use which will go to waste if the different proprietors cannot amicably agree, and the mill acts are considered as an exercise of the power to regulate such property rather than as eminent domain, and accordingly statutes authorizing the erection of dams are justified by any purpose which enures to the general good; there being no taking of property the question of public use is not involved at all.[64]

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[61] Boston & Roxbury Mill Corpn. v. Newman, 12 Pick. 467 (Mass.); Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694.

[62] Gaylord v. Sanitary District, 204 Ill. 576, 68 N. E. 522; Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179.

[63] Head v. Amoskeag Mfg. Co., 113 U. S. 9; Lowell v. Boston, 111 Mass. 454.

30. **Drainage and irrigation.**—Agriculture stands no higher than manufacture and, under ordinary conditions, to enable individual farmers to cultivate their land to better advantage is not a public use; but, as already explained, in localities in which the cultivation of land by ordinary methods is impossible, the constitution does not require the whole region to

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[64] Turner v. Nye, 154 Mass. 579, 28 N. E. 1048.

remain a desert and a waste if it can be saved by authorizing the digging of ditches and drains across the holdings of private owners who refuse their consent. The principle is the same whether the land is too wet or too dry, or whether the reclamation is performed by the state, or by *quasi* municipal corporations called drainage or irrigation districts, or by the private owners themselves.[65] Likewise in states in which the reclamation of land impossible of cultivation by ordinary methods is not essential to the prosperity of the community, the improvement of a particular swamp or meadow owned by several proprietors can be undertaken under that branch of the police power of which the mill acts in Massachusetts are held to constitute an exercise,[66] and swamps and lowlands that menace the public health can always be drained or filled by the exercise of the power of eminent domain.[67] There are, however, in many states, in which agricultural conditions are normal, statutes authorizing a private owner of low land to construct a drain across the property of others upon payment of compensation. Some such statutes antedate the constitutions of the states and their age and the general acquiescence has in some instances sustained them; but they violate the fundamental principles of constitutional law and in most jurisdictions are held to be unconstitutional.

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[65] Fallbrook Irrigation District v. Bradley, 164 U. S. 112; Clark v. Nash, 198 U. S. 361; Mound City Land, etc., Co. v. Miller, 170 Mo. 240, 70 S. W. 721; Talbot v. Hudson, 16 Gray 417 (Mass.).

[66] Wurts v. Hoagland, 114 U. S. 606; Coster v. Tide Water Co., 18 N. J. Eq. 54.

[67] Sweet v. Rechel, 159 U. S. 380; Dingley v. Boston, 100 Mass. 544.

31. **Excess takings.**—Very important questions in regard to what are called "excess takings" will require careful consideration. It is settled that when a taking is made for a public use it need not be limited to the present needs of the public, but may be made with a reasonable regard for future requirements, and if the taking is made in good faith and includes the fee of the property there is nothing improper in the action of those who have made the taking in deriving a private revenue by leasing the surplus land or selling the surplus water or otherwise making a temporary use of the property until the public necessities require it.[68] In some states statutes provide that if, when a taking is made of part of a parcel of land for the public use, a remnant is left too small or ill shaped to be of any practical value, the taking may be extended to include the whole parcel, and under extreme conditions such statutes are probably constitutional, as authorizing a taking reasonably incidental to the public work for which the taking is made.

In many of the older and more densely populated cities of the world the commercial prosperity of the city is retarded by the narrowness and crookedness of the public ways in the business section and by the minute subdivision of the adjoining estates. When it is proposed to rectify such conditions by laying out a broad straight thoroughfare through the heart of the congested district or by widening and straightening the existing ways, the cost of such an improvement is rendered prohibitive by the enormous damages that would have to be paid the owners of buildings cut in halves and left incapable of beneficial use, and a large part of the benefit of the improvement would be lost by the fact that the lots abutting on the new thoroughfare would often be left of such size and shape that buildings appropriate to the improved conditions could not be erected thereon. In European countries, in which the powers of the government are not restricted by a written constitution, the difficulty is solved by the taking of a wide strip of land on both sides of the projected thoroughfare, entire parcels being taken and paid for and no questions of damages to remaining land being left open, and after the new street is built the land is cut up into lots of appropriate size and shape and sold to private purchasers, the profit from the transaction often going far toward paying for the whole improvement. Such an enterprise, however, involves the taking of property for a use not public, and was impossible until recently anywhere within the United States on account of the provisions of the state constitutions.[69] In some of the states, however, the constitutions have been recently amended to permit of just such undertakings, but until the Supreme Court of the United States has passed on the question it cannot be safely said whether such takings would be held to violate the Fourteenth Amendment, or the court would yield to the local interpretation of the public needs as it did in the cases of mining and irrigation in the western states.

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[68] Kaukauna Co. v. Green Bay Co., 142 U. S. 254.

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[69] Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, LEADING ILLUSTRATIVE CASES.

CHAPTER V.

JUST COMPENSATION.

32. **Compensation must be certain.**—A statute which authorizes the taking of land by eminent domain and fails to provide for compensation is unconstitutional.[70] The compensation provided for must be in money. In many of the states the constitutions provide in terms that property cannot be taken unless compensation is paid in advance, or, in some instances, deposited and, in others, secured. In the absence of such provision it is settled that there is no absolute requirement that compensation be paid in advance,[71] and in the case of a taking by a state or a municipal corporation, a definite statutory obligation to make compensation is sufficient.[72] When the taking is made by a private corporation a mere right of action against the corporation by the ordinary processes of law is not enough, and some further security which as a practical matter gives the landowner reasonable protection is required.[73] An owner, of land taken for the public use, who does not receive compensation in advance is constitutionally entitled to interest from the time that he is deprived of possession of the property, at a rate which will constitute a fair compensation for the detention of the money.[74]

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[70] Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226.

[71] Backus v. Fort St. Union Depot Co., 169 U. S. 557.

[72] Sweet v. Rechel, 159 U. S. 380; Talbot v. Hudson, 16 Gray 417 (Mass.).

[73] Cherokee Nation v. Kansas Ry. Co., 135 U. S. 641.

[74] Parks v. Boston, 15 Pick. 198, 208 (Mass.).

33. **Injury to remaining lands.**—When part of a particular parcel of land is taken by eminent domain, the owner is constitutionally entitled to compensation for the injury to the remainder of that parcel,[75] but not for the injury to his other lands.[76] Difficulties frequently arise in determining what constitutes a separate or independent parcel of land. Ordinarily it is a practical question of fact. The land itself rather than the map should be looked at. When land is actually in use unity of use is the chief criterion, and a parcel used for a single purpose is treated as such although cut in two by a highway or railroad. When land is not in use, a physical division by wrought roads makes the parcels so divided independent as a matter of law, and when a large tract of unoccupied land is cut up into lots which are offered for separate sale, each lot may be held to constitute an independent parcel.

34. **Set-off of benefits.**—It is the view of the Supreme Court of the United States and of many of the state courts, that when part of a parcel of land is taken by eminent domain and devoted to some public use which enhances the value of the neighboring land, special and peculiar benefits, not shared by the community at large, should be set off from the damages incurred by the taking.[77] In other words, the parcel is looked at as a whole and the owner is paid the difference between its value as it stood before the

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[75] Bauman v. Ross, 167 U. S. 548, 574, Leading Illustrative Cases.

[76] Sharp v. United States, 191 U. S. 341, Leading Illustrative Cases.

[77] Bauman v. Ross, 167 U. S. 548, Leading Illustrative Cases; Meacham v. Fitchburg R. R. Co., 4 Cush. 291 (Mass.); Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411 (Pa.).

taking and its value after the taking, disregarding any rise in value or general benefit common to the whole community. In a few states even the general benefits are set off from the damages. In the majority of states, however, it is said that the legislature may compensate disadvantages with advantages, but the value of the property taken must be paid for in money, and, while special (in some states also general) benefits may be set off against the damages to the remaining land, they cannot be set off against the value of the land actually taken; and this rule is confirmed in some of the state constitutions.[78] The distinction between general and special benefits is not always easy to draw, but it may be said that, roughly, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and the increased general prosperity resulting from such enjoyment, and that special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object or in similar ways. They must be special and peculiar, and must differ in kind rather than in degree from the benefits which are shared by the public at large; but a benefit does not necessarily cease to be special because it is enjoyed by all the other residents upon the same street.[79]

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[78] In re Water Front, 190 N. Y. 350, 83 N. E. 299; Wagner v. Gage County, 3 Neb. 237.

[79] Peoria, etc., Traction Co. v. Vance, 225 Ill. 270, 80 N. E. 134.

CHAPTER VI.

DUE PROCESS OF LAW.

35. **What questions are judicial.**—The Fourteenth Amendment to the Constitution of the United States, besides preventing a state from authorizing the taking of property for a use not public or without just compensation, prohibits the employment of any form of procedure not sanctioned by ancient practice, or which if new will deprive the owner of property, taken by eminent domain, of a fair opportunity to present his claims and to protect his rights.

If a statute authorizing the taking of land for public use is unconstitutional, the landowner does not lose his rights in the land by any mere paper taking under the supposed authority of the statute, and if physical entry on his land is made, the statute is no justification, and the courts will restore his possession and award him damages as in the case of any other unauthorized trespass. If land is taken under a valid statute, the owner's only right is to assert his claim for damages. The question whether the exigency is such as to necessitate the taking of land by eminent domain is a political and not a judicial question.[80] The owner has no constitutional right to have the necessity or expediency of the taking submitted to a court or jury. The legislature, or the body to which the power has been delegated by the legislature, may decide in each instance whether a particular public improvement shall be undertaken, what land shall be taken for it, and what estate or interest in the land so taken shall pass; but property cannot be arbitrarily taken from one party and turned over to another under pretense of eminent domain, and if the court can see that there is not and cannot be any public necessity for a particular taking it will interfere.[81] If an easement is all that can be reasonably required for the public use the fee cannot be constitutionally taken.

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[80] Shoemaker v. United States, 147 U. S. 282; In re Niagara Falls, etc., R. R. Co., 108 N. Y. 375, 15 N. E. 429.

36. **Record and hearing.**—The owner is entitled to know definitely the extent of the taking. The legislature may authorize a taking by eminent domain by an act which purports to be done under the authority of the statute and which clearly indicates an intention to appropriate permanently the designated property to a public use; but there are good reasons why a taking should be witnessed by a writing, and it is only when a statute plainly permits a taking by an act not appearing of record and the act is of such a kind as to show with reasonable definiteness what is taken that a title can be acquired in this way.[82]

The owner is entitled to notice of the taking, so that he can assert his right to compensation; but it would be impracticable to require that the validity of a taking of property for the public use should depend upon the service of personal notice upon all such persons, resident and non-resident, as might have some property right in the various parcels of land taken. Personal notice is not absolutely necessary upon owners who are known and occupy the land taken, but it should be made reasonably certain that all persons who can reasonably be reached will be informed of the proceedings. Constructive notice, as by posting or publication, is sufficient in the case of non-residents or unknown owners, who may reasonably be expected to keep in touch with what is going on in the place where their land is situated, under penalty of losing their rights to compensation if they neglect this duty.[83]

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[81] Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92.

[82] Bryant v. Pittsfield, 199 Mass. 530, 85 N. E. 739.

The owner is entitled to be heard on the amount of compensation by some impartial judicial tribunal, but not necessarily by a jury. It was the custom almost everywhere when the constitutions of the various states were adopted, for commissioners, of a number less than twelve, to estimate the damages resulting from the taking of land for public use, and consequently a jury trial in such cases is not essential to due process of law or to the usual provisions in the state constitutions to the effect that the right to jury trial shall be "preserved."[84] In a few states, however, the constitutions specifically require a jury trial either in all cases of this character or when the taking is made by a private corporation; and in Massachusetts as the right to jury trial in land damage cases had been given by statutes in force when the constitution of the state was adopted, it was crystallized by the adoption of the constitution into a constitutional right. In those states in which a jury is not required the owner is entitled to a hearing before an impartial judicial tribunal, and to a chance to put in evidence of the value of his property and the amount it has been damaged.[85]

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[83] Huling v. Kaw Valley R. R. Co., 130 U. S. 559.

[84] Secombe v. Railroad Co., 23 Wall. 108 (U. S.); Shoemaker v. United States, 147 U. S. 282; Raleigh & Gaston R. R. Co. v. Davis, 19 N. C. 451.

37. **Limitations and costs.**—The duration of the period for applying for compensation is largely within the discretion of the legislature and is usually much shorter than the period of limitations for enforcing ordinary civil rights.[86] For a statute of limitations to be unconstitutional it must provide a period too short to furnish the owner of the property reasonable opportunity to assert his rights; and what is a reasonable period may well vary in the different states or in different parts of the same state. If a statute allows the owners of land taken an opportunity to apply for damages in such cases as may be reasonably expected to arise, the courts cannot consider the hardship or injustice it may work in a particular instance.

An owner cannot be constitutionally obliged to pay the costs of proceedings brought for the purpose of taking his land and assessing compensation;[87] but if he unsuccessfully contests the validity of the taking he may be compelled to pay costs, and if he appeals from the award of the tribunal which first assessed his damages and fails to have the award increased he may be compelled to pay the costs of the appeal.

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[85] United States v. Jones, 109 U. S. 513, 519.

[86] Rexford v. Knight, 11 N. Y. 308.

[87] Rieker v. Danville, 204 Ill. 191, 68 N. E. 403.

38. **What can be taken.**—All property, whatever its nature, is subject to the power of eminent domain; but a case in which money could be taken for the public use without the violation of some provision of the constitution would be very unusual.[88] Property of a private corporation devoted to a particular public use cannot be taken by another private corporation to be used for the same purpose in the same manner, for no public use or necessity could be subserved by such a taking;[89] but such property may be taken to be used for the same purpose in a different manner, as for example, by an improved method of transportation; or to be used in the same manner for a different purpose, as for example a railroad between two points may be taken for a railroad between one of the same points and a more distant terminus;[90] and a municipal corporation may be authorized to take the property of a private corporation to be used for the same purpose and in the same manner.[91] Although there is no question that the legislature has the power to authorize the taking of land devoted to one public use for a different public use such a taking cannot be made under authority of a general delegation of the power of eminent domain, unless it can be clearly inferred, from the nature and situation of

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[88] Burnett v. Sacramento, 12 Cal. 76; Hammett v. Philadelphia, 65 Pa. St. 146.

[89] Philadelphia, etc., St. Ry. Co.'s Petition, 203 Pa. St. 354, 53 Atl. 191.

[90] Lake Shore, etc., Ry. Co. v. Chicago, etc., Ry. Co., 97 Ill. 506.

[91] Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

the proposed work and from the impracticability of constructing it in any other way, that the legislature intended to authorize such a taking.[92]

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[92] Nichols, Power of Eminent Domain, § 333.

CHAPTER VII.

PROCEDURE, DAMAGES AND EVIDENCE.

39. **Taking and remedy.**—In many states, especially in those in which compensation is required to precede entry upon the land, the corporation desiring to make a taking by eminent domain and having the proper authority from the legislature files a petition in court asking for the condemnation of certain specified property and in the same proceeding in which the taking is effected the damages are ascertained and awarded. In other jurisdictions the taking is effected by the passing of a vote or the filing of a paper in the registry of deeds, and persons whose land is taken or who consider themselves entitled to compensation for any other reason institute the proceedings for the award of damages by filing petitions in court asking that damages be ascertained and paid.

Whatever the method prescribed, it is well settled that, when the statute authorizing the taking is constitutional and its provisions have been complied with, the owners of land taken or injuriously affected are confined to the statutory remedy and cannot have their damages ascertained in an ordinary civil action of trespass.[93] The corporation, in doing what it has been authorized by law to do, is not a wrongdoer and cannot be sued as such. When, however, the statute authorizing the taking is unconstitutional, or the corporation making the taking has failed to comply with the requirements of the statute, or has exceeded its authority under the statute, or has encroached beyond the limits of the taking, or in doing the work has acted negligently and inflicted unnecessary injury upon adjacent land, the statute cannot be invoked as a justification, and the owner of the land has all the remedies he would have for any private trespass.[94] A court of equity will unhesitatingly protect an owner of land from a threatened invasion under color of an unconstitutional statute, and the cases are numerous in which the imposition of an additional servitude upon a public highway has been arrested by injunction.[95] In such a case equity will sometimes retain jurisdiction to ascertain the damages, and will keep the injunction in force until the damages are paid.[96]

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[93] Stevens v. Middlesex Canal, 12 Mass. 466; Lewis, Eminent Domain (3rd ed.), § 873.

40. **Damages when whole parcel is taken.**—When an entire parcel of land is taken, the owner is entitled to recover the fair market value of the land, that is, the probable purchase price, as between a willing seller and a willing buyer, with reference to all the uses to which the land is reasonably adapted and for which it is plainly available, prospective as well as present.[97] What the owner intended to do with the land is of no consequence; and a sentimental attachment or a desire to keep it regardless of price cannot be considered.[98] The extent of the business conducted

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[94] Boston Belting Co. v. Boston, 183 Mass. 254, 67 N. E. 428.

[95] Lewis, Eminent Domain (3rd ed.), §§ 901-922 inc.

[96] Galway v. Metropolitan El. Ry. Co., 128 N. Y. 132, 28 N. E. 479.

[97] Boom Co. v. Patterson, 98 U. S. 403.

[98] Decatur v. Vaughn, 233 Ill. 50, 84 N. E. 50.

on the land is not material, but its value for any purpose, not excepting that for which it is used, may be shown. All features that add to its value may be considered, even if the owner has no legal right to their continuance.[99] Part of the realty should not be separately valued as personal property, but buildings, fixtures, trees, quarries, sand and the like may be considered as enhancing the value of the land as such.[1] The prospective increase in values in the neighborhood due to the very improvement for which the land is taken should not be considered. In some cases land is of such a peculiar character that it is impossible to ascertain its market value, and its real value to the owner may then be the only available test.[2]

41. **Damages when part is taken.**—When part of a parcel of land is taken for the public use, the measure of damages is the decrease in the market value of the original parcel by reason of the taking, and the award accordingly includes the injury to the remaining land as well as the value of the land taken.[3] As anything which has an appreciable effect on the market value of the remaining land is to be considered, a harmful or unpleasant use of the land taken is a legitimate element in the damages, even if it is not such a use as would amount to a nuisance at common law.[4] When the land is taken for a particular pur-

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[99] Low v. Railroad Co., 63 N. H. 557; New York, etc., R. R. Co. v. Blacker, 178 Mass. 386, 59 N. E. 1020.

[1] Peoria, etc., Traction Co. v. Vance, 234 Ill. 36, 84 N. E. 607.

[2] Beale v. Boston, 166 Mass. 53, 43 N. E. 1029.

[3] Bauman v. Ross, 167 U. S. 548, 574, LEADING ILLUSTRATIVE CASES.

[4] Metropolitan, etc., Ry. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098.

pose, damages are to be assessed in view of the reasonably probable consequences of its use for that purpose.[5]

42. **Damages when no land is taken.**—An owner, no part of whose land is taken but who suffers damage by the construction of a public work, is not constitutionally entitled to compensation except in such states as require compensation when property is damaged, but in most of the other states it is customary, in statutes authorizing the taking of land by eminent domain, to include a provision that all damages resulting from the taking shall be paid for. For practical reasons, however, even under the most liberal constitutions and statutes, a decrease in market value of adjacent land due to the construction of a public work does not necessarily constitute a legal damage. A use that would be actionable at common law is a legal damage and injury need not necessarily even be such as would be actionable at common law, but it must be special and peculiar and different in kind from that suffered by the general public. Ordinarily a merely unpleasant use of adjacent land or a more inconvenient use of the streets is not such damage.[6] A change of grade or the discontinuance of a street is, however, a legal damage to the lots abutting upon the portion of the street affected. Similarly, the draining of wells and throwing of dust upon land are also considered special and peculiar damage.[7]

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[5] Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. 489.

[6] Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055.

[7] Chicago v. Taylor, 125 U. S. 161.

43. **Expert and opinion evidence.**—The value of land and buildings taken by eminent domain and the damage to remaining land are matters of opinion and may be proved by opinion evidence. Experts in land values, such as dealers in real estate, may testify as to the value and damage if in addition to a general knowledge of the subject they have some acquaintance with the locality in which the land in question lies, and persons not strictly experts but having a greater knowledge than the public at large of the facts on which to base an opinion may testify as to the value of land.[8] In this class fall local officials whose public duties have given them a knowledge of land values in the vicinity, and especially assessors of taxes.[9] When farming land is taken, farmers who own land in the neighborhood and are familiar with the land taken are competent witnesses,[10] and, in general, persons who own land in the neighborhood and have acquainted themselves with prices and values may give their opinions. The owner himself is generally considered qualified to testify. To a great extent the qualification of a witness is in the discretion of the trial court. An expert may not, under the guise of stating his reasons, describe sales of other lands which are in themselves inadmissible. On cross-examination, however, he may be asked his opinion as to the value of neighboring and adjoining land.

Ordinarily witnesses who do not know the market value of the land are not competent, though they know its value for a special purpose; but when the value of property of a class not commonly bought and sold is in issue, testimony of its value for the special purpose for which it is used may be given by persons qualified only by experience in their own business with similar property.[11]

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[8] Shaw v. Charlestown, 2 Gray 107 (Mass.).

[9] Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544.

[10] Jacksonville, etc., R. R. Co. v. Caldwell, 21 Ill. 75.

44. **Sales of similar land.**—To show the value of land taken by eminent domain the price paid for the land in question or other similar land at about the same time is admissible.[12] It is largely within the discretion of the trial judge whether the other lands are sufficiently like the land taken and the sales sufficiently near in point of time to make the evidence of their price competent. The distance and time within which sales are competent vary with the character of the property and the rapidity with which values are changing.

An actual voluntary sale of the land is necessary to the admissibility of the evidence. The assessed value, offers, or a price agreed upon but not paid, even for the land itself, are inadmissible.[13] Opinion evidence must be confined to the land in controversy. The price paid for neighboring land when taken by eminent domain either as an award, a verdict or a settlement is not admissible, as it is not a sale in open market; but a sale is admissible although part of the purchase price was secured by a mortgage from the purchaser.[14]

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[11] Boteler v. Philadelphia, etc., R. R. Co., 164 Pa. St. 397, 30 Atl. 303.

[12] Wigmore, Evidence, § 463; St. Louis, etc., R. R. Co. v. Haller, 82 Ill. 211; Paine v. Boston, 4 Allen 168 (Mass.). This is the prevailing rule, but see Matter of Thompson, 127 N. Y. 463, 28 N. E. 389; Pittsburg, etc., R. R. Co. v. Patterson, 107 Pa. St. 461, holding evidence of sales of other lands not admissible.

[13] Sharpe v. United States, 191 U. S. 341, LEADING ILLUSTRATIVE CASES.

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CONSTITUTIONAL LAW

PART V

TAXATION

BY

PHILIP NICHOLS, A.B., LL.B.*

CHAPTER I.

THE POWER OF TAXATION.

1. **Definition.**—The power of taxation may be defined as the power, inherent in a sovereign state, to require a contribution of money or other property in accordance with some reasonable rule of apportionment from the persons, property or occupations within its jurisdiction for the purpose of defraying the public expenses.[1]

2. **Distinguished from sale.**—A state or one of its subdivisions, such as a county, city or town, frequently raises revenue or at least defrays the expense of one of its undertakings by selling to the public or to its own inhabitants a commercial commodity, either as a matter of general convenience and to supply a demand which cannot readily be met by individual enterprise, or to dispose of some by-product of the public works or some property no longer needed by

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[1] Cooley, Taxation (3rd ed.), p. 1.

it for the public use. The raising of funds in this manner is not taxation, and is not subject to the constitutional limitations upon the power of taxation.[2] The distinction between a tax and the sale of a commodity is usually not difficult to draw, for although the state, in taxing an occupation which it has the power to regulate or prohibit, in a certain sense sells the privilege of engaging in that occupation, such a transaction depends for its effectiveness entirely upon an exercise of governmental power, while the sale of a commodity by the state to members of the public is an assumption by the state, for the public convenience, of commercial functions, and voluntary payment for the commodity is no more a tax when it is paid to the state than when it is paid to the individual vendor.

3. **Distinguished from police power.**—As an exercise of the police power it is often found desirable to restrict the performance of an act harmless in itself but which if done too frequently will be injurious to the public welfare, and, instead of devising an arbitrary limit to the number of persons who may perform the act or to the number of times it may be performed, the legislature frequently imposes a fee or charge upon the performance of the act which automatically effects the desired result. If the legislative body which establishes the imposition has both the power to tax and the power to regulate the subject-matter and the enactment does not violate the constitutional limitations upon either power, it is of no importance whether the power of taxation

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[2] Cooley, Taxation (3rd ed.), p. 4; Huse v. Glover, 119 U. S. 543.

or the police power was intended to be invoked, and the imposition may well be intended to provide both revenue and regulation.[3] For example, Congress, having both power to lay taxes generally and to regulate foreign commerce, may impose a tariff on imports either as a means of raising revenue or for its indirect effect upon commerce, or for both purposes, and the primary motive is immaterial. A state legislature, having both power to lay taxes generally and the police power, may impose an excise on the sale of intoxicating liquors either as a means of raising revenue or for the purpose of regulating a traffic injurious to public morals or for both purposes. If the primary purpose is to raise revenue, the imposition is a tax; if the primary purpose is to regulate, the imposition is an exercise of the police power.

To ascertain the real purpose of such legislation is of interest from the point of view of the economist or the statesman, but it can have no bearing upon the constitutionality of the enactment. When, however, the legislative body has the power to tax and has not the power to regulate the subject-matter, or has the power to regulate and has not the power to tax it, or the enactment in controversy violates the constitutional restrictions upon the power of taxation but not those upon the police power, it may be of great importance, in deciding whether the enactment is constitutional, to determine in the first place under which power it falls. In such a case the courts in deciding whether the real object of the act is revenue or regulation will not be bound by a legislative declaration of intent, but will examine the act itself and its probable effect, giving weight to the usual presumption in favor of constitutionality, so that the act will be construed to be an exercise of the power of which it would be a valid exercise if such construction is reasonably possible.[4]

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[3] Gundling v. Chicago, 177 U. S. 183.

4. **Effect of the distinction.**—If the legislature has power to prohibit a certain act altogether it may establish a pecuniary imposition upon its performance intended as a substantial prohibition or as a drastic limitation of the number of persons who will perform the act;[5] if, however, the legislature has no power to prohibit the act it cannot establish a pecuniary imposition really intended as a prohibition. For example, a state may constitutionally impose an excessive fee upon the sale of intoxicating liquor or upon the setting up of a lottery, because it may prohibit such sale or setting up altogether as injurious to public morals, and what it may do directly it may do indirectly; but the inheritance of the goods of a deceased person is the exercise of a privilege which the state may tax, but which it may not prohibit, because it is not injurious to the public welfare.[6] Accordingly, a pecuniary imposition upon inheritances is subject to the limitations of the taxing power and must be reasonable. When the legislature has power to tax but not to regulate the subject-matter and establishes a pecuniary imposition, the payment of the imposition is not a license to perform the act,

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[4] Commonwealth v. People's Savings Bank, 5 Allen 428, 432 (Mass.).

[5] Veazie Bank v. Fenno, 8 Wall. 533 (U. S.).

[6] Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512.

and the act may be prohibited by the body which has power to regulate it, notwithstanding the payment of the tax.[7]

5. **Taxes and excises.**—The power of taxation, using the word taxation in its generic sense to indicate all pecuniary impositions laid by public authority for the purpose of raising revenue, embraces two divisions, namely, taxes, properly so called, and excises.

6. **Two classes of taxes.**—Taxes, in their specific sense, are burdens laid directly upon persons or property and include (1) general taxes, laid on all the persons and property or all the persons and property of a certain class in a particular state, county, city, town or other governmental or territorial division, for the purpose of defraying the public expenses of that governmental or territorial division, and (2) special assessments laid on the property specially benefited by a local improvement in proportion to the benefit, for the purpose of defraying the cost of the improvement. In either case the obligation to pay is absolute and unavoidable and is not based upon any voluntary action of the person assessed.

7. **Distinction between general and special tax.**—The system of general taxation which has grown up under our customs, laws and constitutions consists of the assessment at definitely fixed intervals of a sum sufficient to meet the public expenses of each political subdivision upon all the persons or all the property contained therein at a uniform rate, and no

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[7] License Tax Cases, 5 Wall. 462 (U. S.).

attempt to assess each taxpayer for the benefit he receives, either from the public expenditures as a whole or from the different items of such expenditures, is required. In some instances, however, a particular public improvement, while enhancing the general public convenience to a certain extent, is so peculiarly advantageous to a definite territory which does not happen to coincide with one of the existing political subdivisions of the state that it is deemed more just to assess the cost of the improvement upon the benefited area than to include it in the general tax levy upon the entire community. For example, the cost of maintaining a bridge is sometimes imposed upon certain designated counties or towns, and in other cases *quasi* corporations called districts are created to support the schools, to furnish a water supply or to provide for the extinguishment of fires in the territory embraced in the district. Although the funds in such instances are raised by a tax assessed upon all property within the district at a uniform rate, yet they represent a departure from the fundamental principle of general taxation in attempting to impose the expense of a particular item or branch of public enterprise upon the territory actually benefited by it. One step farther takes us to the true special assessment or betterment in which the cost of a particular improvement is assessed in whole or in part upon the territory benefited by the improvement in proportion to the benefit received by each parcel of land within such territory.

8. **Special assessments.**—The special assessment is no modern innovation. As early as 1658 a public

way was laid out by the general court of the colony of Massachusetts Bay and power was given to impose the cost on "all such as shall have benefit of the way." Similar statutes were enacted at intervals throughout the whole of the colonial and provincial periods in the other colonies. Statutes were also common which provided that persons receiving any benefit from common sewers should pay to the persons who had built the sewers a proportional part of the cost, that damages caused by the laying out of particular and private ways should be paid by the persons benefited, that sidewalks in cities should be built at the expense of the abutters, and that the cost of the drainage of swamps and meadows should be apportioned according to benefit.

Subjected to modern critical analysis not all of these statutes appear to be an exercise of the power of taxation; some of them seem to fall within the police power and others are very close, at least, to the power of eminent domain in imposing the obligation of paying the land damages caused by a particular improvement upon the persons who were responsible for its construction. Nevertheless these statutes, although difficult or impossible to classify, paved the way for the true special assessment in its present form, which unquestionably is imposed under the power of taxation, although pecuniary impositions under the police power have also a recognized place in our jurisprudence. Special assessments in their modern form, imposed by administrative officers upon the land specially benefited by a public improvement and paid directly to the public authorities, have become common only in the last seventy years. A special assessment, though justified as an exercise of the taxing power and itself undoubtedly a form of taxation, is not necessarily a "tax" when that word is used without qualification in a statute or contract, and whether the word "tax" so used is intended to include special assessments must be gathered from the surrounding circumstances.[8]

9. **Excises defined.**—Excises, in their original sense, were something cut off from the price paid on a sale of goods as a contribution to the support of government. The word has now come to have a broader meaning and to include every pecuniary imposition established under the power of taxation which is not a burden laid directly upon persons or property, or in other words, every charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege or the engaging in an occupation. The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking.

10. **Two classes of excises.**—Excises are divided naturally into two classes, namely, those laid on the importation of foreign goods, and those laid on domestic goods, privileges or transactions. Excises of the former class were introduced into England in the time of James I, but those of the latter did not

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[8] Hitchcock v. Galveston, 96 U. S. 341; Bridgeport v. New York, etc., R. R. Co., 36 Conn. 255.

appear in that country until 1643. Numerous statutes imposing excises of both classes were enacted in the American colonies, the duties on imports forming an important source of income to the local governments. The domestic excises were at first chiefly on the sale of wines or distilled liquors at retail, but were extended to include a great variety of subjects.

11. **Excises in common use.**—During the first twelve years after the Declaration of Independence, the states had and exercised the power of laying duties on imports, but upon the adoption of the Constitution of the United States this power passed to Congress, leaving in the states the power concurrently with Congress of laying excises on domestic transactions. During the war of revolution excises had been laid by the states with great freedom, not only upon the sale of liquors and tea and the use of carriages, but upon articles of various kinds manufactured within the states. After the close of the war many of the more burdensome excises were abolished, but others were continued in force, especially the excise on the sale of liquors at retail, which is still employed in every state in which such sale is not wholly forbidden. Although a large revenue is often derived from liquor licenses, it is now generally considered that the license fee is an incident of regulation and is imposed under the police power rather than the power of taxation. In recent times new excises have been introduced yielding very large returns, one of the most important being the inheritance or succession tax by which the passing of the goods of deceased persons to the heirs or devisees is

subjected to the payment to the state of a certain proportion increasing with the size of the legacy or distributive share and the distance of the relationship of the beneficiary to the deceased. Other important excises in common use are upon the franchises of domestic corporations, and upon the privilege granted by a state to a foreign corporation to do business within its limits, and upon the sale of shares of stock.

12. **Importance of distinction between tax and excise.**—In the constitutions of many of the states different limitations apply to taxes and to excises and it is consequently important in every case in which the constitutionality of an attempted exercise of the power of taxation is assailed to determine whether the pecuniary imposition under consideration is a tax or an excise. The substance of the distinction is guarded by the courts, and it would not be permissible to evade the limitations upon the power of laying taxes upon property by imposing an excise upon the privilege of owning property,[9] nevertheless every excise is indirectly a tax upon property and it is perfectly legitimate to base the amount of an excise upon the value of the privilege taxed, and to estimate the value of the privilege by taking into consideration the value of the property to which the privilege relates.

Such an excise, however, is in no sense a tax on the property, and the value of property which is not subject to taxation may be considered in determining the value of a privilege for the purpose of fixing the amount of an excise.[10]

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[9] Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, LEADING ILLUSTRATIVE CASES.

13. **Distinction in the Federal Constitution.**—In the Constitution of the United States it is provided that Congress shall have power "to lay and collect taxes, duties, imposts and excises * * * but all duties, imposts and excises shall be uniform throughout the United States,"[11] and that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."[12] There has been great difficulty over the meaning of the last clause, and it was held or intimated in the earlier decisions that the only direct taxes besides poll taxes were taxes on real estate, the theory being that the landowner ultimately paid all taxes and so a tax on land was direct and other taxes indirect.[13] Later decisions repudiated this doctrine and held a tax on the income of personal property a direct tax which to be constitutional must be apportioned among the states in proportion to population,[14] so that there does not seem to be now any substantial difference in the distinction usually recognized between taxes and excises and that between "capitation and other direct taxes" and "duties, imposts and excises" in the Constitution of the United States.

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[10] Hamilton Co. v. Massachusetts, 6 Wall. 632 (U. S.); Flint v. Stone Tracey Co., 220 U. S. 107.

[11] Art. I, § 8, cl. 1.

[12] Art. I, § 10, cl. 4.

[13] Hylton v. United States, 3 Dall. 171 (U. S.); Springer v. United States, 102 U. S. 586.

[14] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

TAXATION BY THE UNITED STATES AND OF UNITED STATES PROPERTY.

14. **Direct taxes.**—As already stated, direct taxes levied by the United States must be apportioned among the several states according to population, and excises must be uniform throughout the United States. A direct tax apportioned according to population would have to be assessed at a much higher rate on property in a poor but populous state than upon property of the same class in a state in which more of the property was owned but the population was no greater, and as the wealth per capita of the different states varies so widely a direct federal tax has not been looked upon with favor. A tax upon incomes not apportioned was at first sustained as an excise; but when in 1895 it was held to be a direct tax a federal income tax ceased to be practicable. In 1913, however, an amendment to the Constitution was adopted authorizing the laying of an income tax without apportionment.

15. **Duties and excises.**—The revenue of the federal government is principally derived from excises such as the duty on imports and the internal revenue tax upon the manufacture of intoxicating liquors and tobacco. The power of the United States to levy excises within the limits of the several states is not limited to such acts, occupations and privileges as

pertain to the functions of the federal government, but is as complete as if the separate sovereignty of the states did not exist.[15] The only limitations upon the power in this regard is that the exercise of the governmental functions of a state cannot be subjected to a tax; the issuance of bonds by a state, the salary of a state officer and proceedings in a state court are constitutionally exempt from any federal excise.[16] Franchises and privileges created by a state are fully subject to federal taxation,[17] and even the state itself may be taxed if it carries on business of a private character.[18]

16. **Regulation under guise of taxation.**—There is a further limitation that the United States cannot, under the pretense of imposing a tax, regulate a subject-matter properly within the police power of the states, but this is a restriction which must largely be left to the discretion of Congress. The courts could not interfere and hold that a statute purporting to constitute an exercise of the taxing power was really an encroachment on the reserved powers of the states except in the most flagrant and obvious case.

17. **Property of the United States.**—It follows from the supremacy of the United States under the Constitution that no state can burden the government of the United States in the performance of the functions assigned to it by that instrument. No state can tax the property of the United States within the

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[15] Knowlton v. Moore, 178 U. S. 41.

[16] Collector v. Day, 11 Wall. 113 (U. S.); Mercantile Bank v. New York, 121 U. S. 138; Fifield v. Close, 15 Mich. 505.

[17] Flint v. Stone Tracy Co., 220 U. S. 107.

[18] South Carolina v. United States, 199 U. S. 437.

limits of the state; but property in which the title of the United States is less than exclusive is subject to taxation to the extent of its private ownership.[19] Persons who reside on lands within a state purchased by or ceded to the United States, when there has been no other reservation of jurisdiction by the state than the right to serve civil and criminal process on such lands, are not subject to taxation for their polls and personal estate by the state.

18. **Bonds—Officers' salaries.**—No state may tax the instrumentalities which the United States employs to execute the powers conferred upon it by the Constitution. For this reason a state cannot tax in any form the obligations of the United States issued in the exercise of the power to borrow money upon the credit of the United States.[20] While a state may not tax the whole capital stock of a corporation if part of its property consists of United States bonds, an excise may be imposed though based on a valuation which includes such bonds,[21] and United States bonds may be seized on distress for non-payment of taxes due on taxable property.[22] The compensation of an officer of the United States cannot be taxed by a state,[23] but an employee of the United States not a public officer may be taxed on his income, and when the salary of an officer has been paid to him by the

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[19] Van Brocklin v. Tennessee, 117 U. S. 153; Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496.

[20] McCulloch v. Maryland, 4 Wheat. 316, 436 (U. S.), LEADING ILLUSTRATIVE CASES; Weston v. Charleston, 2 Pet. 449 (U. S.); Home Savings Bank v. Des Moines, 205 U. S. 503.

[21] Plummer v. Coler, 178 U. S. 117.

[22] Scottish Union & Nat. Insurance Co. v. Bowland, 196 U. S. 611.

[23] Dobbins v. Erie County, 16 Pet. 435 (U. S.).

government and has come into his possession, it loses its identity as salary and becomes personal property liable to taxation by the state.[24]

19. **National banks—Transcontinental railroads.** —The United States has in many instances seen fit to charter private corporations for purposes justified by the Constitution, and it is well settled that no state can tax such corporations for the privilege of exercising the functions allotted to them by the United States or tax their property in such a way as to impede or prevent the performance of such functions; but the property of such corporations within the jurisdiction of a state is taxable unless specifically exempted by Congress. The taxation of national banks has been permitted under certain restrictions by Congress.[25] It is settled that Congress may exempt them from taxation if it sees fit, or permit the states to tax them, without exceeding its powers under the Constitution.[26] The transcontinental railroads were chartered by Congress and given subsidies and grants of land, and they agreed to serve the government for a reasonable compensation. It was held that the exemption of such federal agencies from state taxation depended upon the effect of the tax, and if it deprived the agent of power to serve the government efficiently, it was invalid. A tax upon their property, it was held, had no such necessary effect, but a tax upon their operations was held to be a direct obstruction to the exercise of federal powers.[27]

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[24] Dyer v. Melrose, 215 U. S. 594.

[25] U. S. Rev. Stats., § 5219.

[26] Van Allen v. The Assessors, 3 Wall. 573 (U. S.).

[27] California v. Central Pacific R. R. Co., 127 U. S. 1.

CHAPTER III.

TAXATION OF FOREIGN AND INTERSTATE COMMERCE.

20. **Duties on imports and exports.**—The power of levying duties on imports, exports and tonnage is specifically forbidden to the states without the consent of Congress, by Article I, § 10, of the Constitution of the United States. Imports and exports within the meaning of this provision include only property arriving in the United States or sent therefrom, from or to a foreign country, and it accordingly does not apply to goods sent from one state to another, to passengers traveling from one state to another, or to passengers entering the United States. It is not competent for a state to tax imported goods until they have lost their character as imports after arriving at their destination and becoming mingled with the other property in the state.[28] Such mingling is effected by their being taken from their original packages, sold, or offered for sale. It is clearly unconstitutional for a state to require a license for the sale of imported goods, or to attempt to make an excise, imposed on sales generally, applicable to the sale of foreign goods in the original package by the person who imported them.[29]

21. **Duties of tonnage.**—A duty of tonnage is a charge upon a vessel, according to its size or capacity,

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[28] Brown v. Maryland, 12 Wheat. 419 (U. S.), LEADING ILLUSTRATIVE CASES.

[29] Cook v. Pennsylvania, 97 U. S. 566.

for the privilege of navigating the waters of a state or of entering or leaving a port therein, and any such charge is forbidden by this clause of the Constitution, even if the vessel so taxed belongs to citizens of the state imposing the tax, and plies only within the waters of the state.[30] A tax upon vessels as property, imposed by the state in which they belong and based upon their value as property, is not a duty of tonnage.[31]

22. **States cannot tax interstate commerce.**—Article I, §8, of the Constitution of the United States provides that Congress shall have power to regulate commerce with foreign nations and among the several states. It is to be noted that this provision of the Constitution does not in terms prohibit the states from regulating interstate commerce, and it has not been interpreted as in itself excluding them from all control over such commerce. It is only with regard to matters upon which Congress has acted or which in their nature require uniform treatment that the states are precluded from acting. Applied to the state power of taxation, the interstate commerce clause prohibits a state from taxing in any manner the privilege of engaging in interstate commerce within its limits, or from imposing a tax upon property engaged in interstate commerce at a higher rate than is imposed upon other property.

23. **Rights of foreign corporations.**—A resident of another state or even a foreign corporation cannot be prohibited by a state from engaging in interstate

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[30] State Tonnage Tax Cases, 12 Wall. 204 (U. S.).

[31] Transportation Co. v. Wheeling, 99 U. S. 273.

commerce within its limits or be taxed for the privilege of so engaging;[32] but a corporation doing both interstate and local business may be subjected to an excise for the privilege of doing the local business within the state.[33] When, however, the interstate and the local business of a corporation are so closely connected that it would be difficult if not impracticable to separate them, as is usually the case with a railroad or a telegraph company doing business outside the state of its origin, the state has not the right to impose an unreasonable tax on the local business which the corporation would as a practical matter be obliged to pay or abandon its interstate business, nor can the state under like circumstances require the corporation to pay a tax on its interstate business or upon property situated outside the state as the price for permitting it to engage in local commerce.[34] When the interstate and the local business of a foreign corporation are separable, as is usually the case with a purely private corporation engaged in ordinary mercantile transactions, a tax on the local business is clearly valid even, it would seem, if unreasonably high, or based upon the entire business of the corporation, which could readily confine itself to its interstate transactions if unwilling to pay the tax. At any rate, a reasonable charge upon the privilege of doing a local business is not necessarily objectionable merely because its amount depends upon the entire capital of the corporation.

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[32] Crutcher v. Kentucky, 141 U. S. 47.

[33] Osborne v. Florida, 164 U. S. 650.

[34] Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

24. **Valuation of interstate lines.**—It is well settled that the property of a corporation engaged in interstate commerce which lies within the jurisdiction of a state may be taxed by the state in the same manner as other property without violating the provisions of the Constitution relating to interstate commerce; and the franchise of the corporation may also be taxed.[35] There is no objection to fixing the value of the property of such a corporation within the state by taking the proportion of the total value of its capital stock that the miles of its line within the state bear to its total mileage, or by any other similar method which is not unreasonable.[36] A tax cannot be imposed upon the business done or upon the gross receipts, but the gross receipts may be taken as a guide to the value of the franchise. The court will look at the substance rather than the form and will sustain a tax which appears on its face to be an excise on the privilege of engaging in interstate commerce, if the amount of the tax is made dependent upon the value of the property, or even of the gross receipts within the jurisdiction of the state of the corporation taxed, and no other tax is imposed upon the corporation and payment of the tax is not made a condition precedent to doing business within the state; for such a tax is in substance a tax upon the property of the corporation within the state.[37]

25. **Peddlers and drummers.**—There is no doubt

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[35] Old Dominion Steamship Co. v. Virginia, 198 U. S. 299; Delaware Railroad Tax, 18 Wall. 206 (U. S.).

[36] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18.

[37] United States Express Co. v. Minnesota, 223 U. S. 335.

that a state may tax the occupation of a peddler, that is, a person traveling from place to place selling goods which he carries with him, although the goods are manufactured in another state and the peddler is really the agent of a dealer located in another state;[38] but a drummer or commercial traveler who takes orders in one state for goods to be shipped from another is so closely identified with interstate commerce that his occupation cannot be taxed by the state.[39] A privilege tax on all dealers may, however, be collected from a person whose principal business is in soliciting orders for manufacturers outside the state.

26. **Goods in transit.**—Goods imported from a foreign country cannot be taxed by the state before they are sold, not because such a tax would in itself be an unconstitutional interference with foreign commerce, but because such a tax would be a duty on imports which the states are specifically forbidden to impose and also an interference with the acts of Congress laying duties on imports the payment of which carries the right to sell the goods; but goods brought into one state from another may be taxed while in the original package and before they have been sold if there is no discrimination in favor of goods made within the state.[40] Similarly, goods brought together and prepared for export may be made subject to a general tax.[41] Goods while actually in transit between two states are not subject to local

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[38] Emert v. Missouri, 156 U. S. 296.

[39] Robbins v. Shelby County Taxing District, 120 U. S. 489.

[40] Woodruff v. Parham, 8 Wall. 123 (U. S.).

[41] Coe v. Errol, 116 U. S. 517.

taxation,[42] and do not forfeit their exemption by short halts incidental to the journey; but property brought in from another state and held for the convenience of the owner prior to completing its journey in the same state is taxable.

27. **Discrimination against products of other states.**—No state can constitutionally impose a tax which operates in such a way as to discriminate against goods brought in from another state.[43]

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[42] Kelley v. Rhoads, 188 U. S. 1, 7.

[43] Darnell & Son v. Memphis, 208 U. S. 113.

CHAPTER IV.

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS AND DISCRIMINATION AGAINST CITIZENS OF OTHER STATES.

28. **Contracts of exemption.**—Article I, § 10, of the Constitution of the United States provides that no state shall pass any law impairing the obligation of contracts. It is now well established that the legislature of a state may enter into a binding contract that certain property shall be forever exempt from taxation and that a grant of exemption to an individual or corporation made upon valuable consideration is a contract which a subsequent legislature cannot alter or rescind without violating the Constitution. When the exemption is part of the consideration of the sale of lands, or the state receives payment for the grant of exemption, the case is clear; and even when there is no consideration other than the acceptance of a charter and the undertaking of public or quasi-public duties by the corporation chartered, an exemption from taxation contained in the charter cannot be taken away.[44] An exemption which is a pure gratuity and not given in consideration for any undertaking or obligation upon the part of the grantee is not a contract and may be repealed whenever the legislature sees fit.[45] A contract of exemp-

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[44] New Jersey v. Wilson, 7 Cranch 164 (U. S.); State Bank of Ohio v. Knoop, 16 How. 369 (U. S.).

[45] Christ's Church v. Philadelphia, 24 How. 300 (U. S.).

tion from taxation is construed strictly and is never extended by implication in the slightest degree.

29. **General laws not a contract.**—The same rules are applied to a charter provision fixing the taxation of a corporation in a limited or peculiar manner; if such a charter contains the attributes of a contract it cannot be impaired by the state. The grant of exemption, to constitute a contract, must be a special one; a corporation chartered at a time when by the general laws in force it would not be subject to taxation cannot insist that the general laws so far as it is concerned shall forever remain unchanged.[46] When by the Constitution or the general laws in force at the time a special charter of exemption is granted, the charters of all corporations are issued subject to alteration, amendment, or repeal by the legislature, the exemption is held subject to the will of the legislature.[47]

30. **Contracts of exemption limited.**—No contract can arise from an unconstitutional law; and in those states in which the power of the legislature to grant exemptions from taxation is limited by the provisions of the state constitution no exemption even upon valuable consideration would constitute a valid contract unless it was based upon a lawful subject of exemption. Moreover, since 1819 charters of incorporation in most of the states have been granted subject to the right of alteration, amendment, and repeal, so that there are very few special exemptions which are above the power of the legislature to withdraw.

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[46] Providence Bank v. Billings, 4 Pet. 514 (U. S.).

[47] Tomlinson v. Jessup, 15 Wall. 454 (U. S.).

31. **Creditors' rights to continuance of tax.**—There is another condition under which the constitutional provision now under consideration has been invoked so as to restrict the power of a state legislature over the laws relating to taxation. When a municipal corporation incurs an indebtedness by authority of the legislature and the statutes in force at the time provide for the assessment and collection of taxes sufficient to meet the indebtedness when it falls due, a subsequent statute amending or repealing the statutes in such a way as to substantially impair the ability of the municipal corporation to pay the debt impairs the obligation of the contract and is unconstitutional and void. So far as the creditors are concerned, the old statutes are still in force, and upon the application of a judgment creditor who has been unable to enforce his judgment a federal court will issue a writ of mandamus compelling the local authorities to collect taxes under the statutes in force when the debt was incurred.[48] When, however, the state itself is the debtor such a remedy is not available, as a state cannot be sued without its consent either directly or through its officers. Hence a state, if it wishes to aid a municipality in avoiding its obligations, can deprive its creditors of all possible remedy for non-payment of the debts by abolishing the municipality.[49]

32. **Change in law making tax unlawful.**—If municipal indebtedness is incurred by authority of statute for a lawful purpose, the legislature or even

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[48] Von Hoffman v. Quincy, 4 Wall. 535 (U. S.).

[49] Meriwether v. Garrett, 102 U. S. 472.

the people of a state by a change in the constitution cannot subsequently make the purpose unlawful so as to deprive the creditor of his rights to enforce the debt; and when the purpose has been held lawful by the highest court of the state a subsequent decision holding the purpose unlawful is as against persons who have advanced money to the municipality on the faith of the earlier decision an impairment of the obligation of the contract, which, under the provision of the Constitution, the Supreme Court of the United States will not permit.[50]

33. **What constitutes discrimination.**—Article IV, §2, of the Constitution of the United States provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Primarily this clause of the Constitution prohibits a state from taxing the property of non-residents at a higher rate than the property of its own citizens and from imposing upon non-residents a greater excise for the privilege of doing business within the state than that imposed upon its citizens. A state statute prohibiting persons not residents of the state from selling goods within the state except upon payment of a license fee higher than that imposed upon resident merchants is in violation of this provision,[51] but a uniform tax upon all sales within the state, whether made by a citizen of the state or by a citizen of another state, is unobjectionable.[52] If a state attempts to tax shares of stock in

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[50] Gelpcke v. Dubuque, 1 Wall. 175 (U. S.).

[51] Ward v. Maryland, 12 Wall. 418 (U. S.).

[52] Woodruff v. Parham, 8 Wall. 123 (U. S.).

a domestic corporation owned by non-residents, it must not tax them more severely than shares held by its own citizens.[53]

34. **Rights of foreign corporations.**—A corporation is not a citizen within the meaning of this clause of the Constitution and it consequently has no constitutional rights as such to transact business in any state other than that from which it received its charter.[54] A state can accordingly impose whatever tax it sees fit upon a foreign corporation seeking to do a purely local business within its limits, and if the corporation wishes to avail itself of the privilege it must take it subject to the accompanying burden.[55] When, however, a corporation is in the service of the United States, or engaged in foreign or interstate commerce, the state cannot lawfully exclude it from its limits, or tax it for the privilege of entering them, but these exemptions arise from other provisions of the Constitution than that now under consideration.[56] When a foreign corporation has already come into a state in compliance with the laws of the state and has acquired property of a fixed and permanent nature therein, the state cannot thereafter subject it to a new and additional franchise tax which is not imposed upon domestic corporations doing a similar business.[57]

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[53] Williams v. Fears, 179 U. S. 270.

[54] Paul v. Virginia, 8 Wall. 168 (U. S.).

[55] Horn Silver Mining Co. v. New York, 143 U. S. 305.

[56] See §§ 19 and 23.

[57] Southern Ry. Co. v. Greene, 216 U. S. 400.

CHAPTER V.

THE PUBLIC USES FOR WHICH TAXES CAN BE LEVIED.

35. **The use must be public.**—The principle that money cannot be raised under the form of taxation to be devoted to a use not public is expressed in various ways in the constitutions of the different states, and indeed may be said to follow from the existence of any restrictions upon the power of taxation found in the grant of that power to the legislature, a grant of power which is intended to cover the whole subject of legislation for the purpose of revenue and to exclude any arbitrary imposition which could not rightly be dignified by the name of tax.[58] Taxation for a use not public is also forbidden by the Constitution of the United States, as not constituting due process of law.[59] The power to levy taxes is founded on the right, duty and responsibility of maintaining and administering the governmental functions of the state and of providing for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service or some object which concerns the public welfare. The promotion of the interests of individuals, and the incidental benefit to the pub-

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[58] The power of Congress to levy taxes is only "to pay the debts and provide for the common defense and general welfare of the United States." U. S. Const., Art. I, § 8.

[59] Loan Association v. Topeka, 20 Wall. 655 (U. S.), LEADING ILLUSTRATIVE CASES.

lic which may result from their prosperity, does not justify the grant to them of public money raised by taxation to enable them either to use their property or to carry on their business to better advantage.[60]

36. **Public service a public use.**—The test of a public use for the purpose of taxation is, however, much the same as that employed in ascertaining proper subjects for the power of eminent domain, and it is well settled that private corporations which furnish the public with the necessities and conveniences of life and are of such a character that it is customary and proper to entrust them with the power of eminent domain may be aided, if the legislature deems it advisable, by public funds raised by taxation.[61]

37. **Business enterprises.**—It would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals with a view either to the profit that could be made through the income to be derived from the business or to the indirect gain that might result to purchasers if prices were reduced by governmental competition.[62] It is, however, permissible for the government to embark in the enterprise of furnishing the public with the necessities and conveniences of life whenever the

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[60] Loan Association v. Topeka, 20 Wall. 655 (U. S.), LEADING ILLUSTRATIVE CASES; Lowell v. Boston, 111 Mass. 454.

[61] See subject, EMINENT DOMAIN, §§ 24, 25. Public funds may be given to a railroad company: Railroad Co. v. County of Otoe, 16 Wall. 667 (U. S.).

[62] Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142; 182 Mass. 605, 66 N. E. 25; 211 Mass. 624, 98 N. E. 611.

exercise of a governmental function such as the exclusive use of a portion of the public streets or the exercise of the power of eminent domain is required to carry on the enterprise.[63]

38. **Moral obligations — Gratuities.** — Another phase in which the power of the legislature to dispose of funds raised by taxation has frequently been considered consists of the payment to individuals who have performed meritorious services to the public of sums of money when there is no legal obligation to make such payment. It is well settled that a statute providing for the payment of moral obligations is constitutional, and there is no objection to reimbursing individuals for money they have paid on behalf of the public or expenses they have incurred in the performance of public service or the defense of public rights.[64] When, however, persons formerly in the service of the state have received their allotted compensation and it is sought to allow them an additional unstipulated reward, such payment cannot constitutionally be made with the public funds unless it can fairly be thought that the result will be to encourage loyalty and faithful service and that the public good will be thereby served.[65]

39. **The use must be of the district taxed.**—Taxation must be for the public uses of the district taxed. It is not competent for the legislature of a state to

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[63] Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084; State v. Toledo, 48 Ohio St. 112, 26 N. E. 1061.

[64] Cooley, Taxation (3rd ed.), p. 209; Bristol v. Johnson, 34 Mich. 123.

[65] Opinions of the Justices, 166 Mass. 589, 44 N. E. 625; 175 Mass. 599, 57 N. E. 675; 186 Mass. 603, 72 N. E. 95; 190 Mass. 611, 77 N. E. 820; 211 Mass. 608, 98 N. E. 338; Brodhead v. Milwaukee, 19 Wis. 624.

donate money, raised by taxation upon the persons and property within the state, for the relief of residents of other states or of foreign countries who may be suffering from famine, flood or other disaster. It would not be within the power of the legislature to impose arbitrarily upon one city or town the whole cost of a public improvement in a city or town situated in a distant part of the state or to require the municipality in which a state institution happened to be established to sustain the whole cost of maintaining it. Nevertheless, the legislature has a wide discretion in the apportionment of public burdens among the different subdivisions of the state, and a statute imposing the cost of maintaining a particular public improvement upon the counties, cities or towns that may in the opinion of the legislature be benefited by the establishment of the improvement is unquestionably constitutional unless the court can plainly see that it was not enacted in good faith and was intended as the mere spoliation of a district in disfavor with the prevailing party in the legislature.[66] A town may be compelled to pay the whole or part of the cost of a state institution within its limits if the town receives most of the benefit from its establishment or if, as in the case of public highways, such provision is a fair and convenient way of distributing a general public burden among the cities and towns of the state.

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[66] Merrick v. Amherst, 12 Allen 500 (Mass.); Steiner v. Sullivan, 74 Minn. 498, 77 N. W. 286; Kirby v. Shaw, 19 Pa. St. 258.

CHAPTER VI.

THE SITUS OF PROPERTY FOR THE PURPOSE OF TAXATION.

40. **State cannot tax property not within its jurisdiction.**—It is well settled that no state can tax property that is not within its jurisdiction. This rule as a moral obligation is inherent to the very existence of a constitutional government and it is established by the Fourteenth Amendment to the Constitution of the United States as a practical restriction enforced by the federal courts. An attempt by a state to require property not within its jurisdiction to contribute to the support of the government thereof would not be taxation, but spoliation; and it would deprive the owner of his property without the essential "due process of law."[67] It is not, however, always easy to determine the location or situs of property, as it is called, so as to fix the jurisdiction for the purpose of taxation.

41. **Real estate—Unit system.**—Real property is of course taxed only in the state in which it is situated. Nevertheless a railroad, telegraph line or other similar system extending through two or more states may be valued as a unit, and the proportion of the total value which the mileage within one state bears to the total mileage may be used as a basis of taxation within that state, unless there are some peculiar

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[67] State Tax on Foreign Held Bonds, 15 Wall. 300 (U. S.).

circumstances which render such a method so unjust as to constitute it a mere subterfuge for taxing property outside the state. In determining the total value in such a case it is proper to include the value of the franchise of the company, and a reasonable method of determining the total value of the franchise and the other property employed in the system considered as a going concern is to take the total value of the capital stock, deducting property located in another state and not used in the business.[68] An express company doing business in several states, although its property is not physically bound together like a railroad or a telegraph line, may be taxed in accordance with the method above described.[69]

42. **Tangible personal property.**—The situs of personal property was formerly governed by the maxim that movable property follows the owner, and it was the practice theoretically at least to tax an individual in the state of his domicile for all his personal property, tangible and intangible, wherever situated, although the propriety of taxing tangible personal property in the state in which it is permanently located, regardless of the domicile of its owner, has long been recognized.[70] Thus tangible property kept by its owner in a state other than that in which he dwelt might have been subject to double taxation. Recently, however, the Supreme Court of the United States has held that a state has no power to tax tangible personal property permanently located

[68] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530.

[69] Fargo v. Hart, 193 U. S. 490.

[70] Old Dominion Steamship Co. v. Virginia, 198 U. S. 299.

outside the limits of the state, although owned by one of its own citizens or by a domestic corporation.[71] A state does not, however, lose the power to tax the tangible personal property of a resident or of a domestic corporation to its full value by reason of the fact that it is frequently taken into other states; the rule that movable property follows the owner prevails unless the property in question has acquired a definite location in another state,[72] but property regularly used in several states may be taxed in each state in proportion to the average amount within the limits of the state imposing the tax.[73]

43. **Intangible property.**—With regard to intangible property, or even property evidenced by tangible pieces of paper such as notes, bonds or stock certificates, as a general rule the old maxim prevails and the situs of the property for the purpose of taxation is the domicile of its owner, the creditor and not the debtor being of course the owner of a debt.[74] Intangible property may, however, be so identified with a certain locality by being used in connection with a business carried on therein that it is proper to tax it in that locality.[75] Shares of stock in a corporation may be made taxable in the state in which the corporation is organized, whether owned by residents or non-residents;[76] and it is also customary to tax such shares in the domicile of their owner.

[71] Union Transit Co. v. Kentucky, 199 U. S. 194.

[72] Southern Pacific Co. v. Kentucky, 222 U. S. 63.

[73] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26.

[74] State Tax on Foreign Held Bonds, 15 Wall. 300 (U. S.); Kirtland v. Hotchkiss, 100 U. S. 491.

[75] Buck v. Beach, 206 U. S. 392.

[76] Corry v. Baltimore, 196 U. S. 466.

CHAPTER VII.

UNIFORMITY, EQUALITY AND DUE PROCESS OF LAW.

44. Classification not forbidden by Fourteenth Amendment.—It may be taken as fundamental that taxes must be apportioned by a general rule applied without any arbitrary discrimination against any individual or class of individuals, and that it would not be competent for the legislature to tax the property or the privileges and occupations of a designated person, or of persons of a certain race, or political party, or religious belief, at a greater or less rate than similar property or the same privileges and occupations when owned or exercised by the rest of the community. Mere arbitrary discrimination and distinctions based upon immaterial differences would deprive the victims of the equal protection of the laws in violation of the Fourteenth Amendment as well as of corresponding provisions in many of the state constitutions. It may be taken as equally well settled that there is nothing in the Fourteenth Amendment which requires a state to tax all property within its jurisdiction at the same rate. Different classes of property may be taxed at different rates as the public policy of the state may seem to require and excises may be imposed upon certain occupations and not upon others without violating the provisions of the amendment unless there is a clearly hostile discrimination against certain persons or classes not based upon any reasonable distinction.[77] Certain classes of property may be wholly exempted from taxation without giving rise to an occasion for interference by the federal courts.[78]

45. **Classification prohibited in some states.**—There are, however, special provisions in the constitutions of many of the states requiring that taxes shall be uniform, or proportional or imposed equally upon all property, and in such states the legislature has not the power to classify property for the purpose of taxation or to exempt property of a certain class as a matter of public policy or for the encouragement of a particular industry. All property within the jurisdiction of the state which is owned and held in such a way that it ought to be available to its owner to increase his ability or enlarge his duty to assist in defraying the expenses of the government must be included in the aggregate of property upon which assessments are made and all such property in a given taxing district must be assessed at the same rate. Exact proportion is of course impossible, but the aim of every statute must be equality, and a statute which tends directly and necessarily to produce disproportion is unconstitutional. A statute exempting property from taxation is accordingly invalid unless it applies only to property already taxed, directly or indirectly, in some other way, to property devoted to a public or semi-public use, or to property of insignificant value and of such character that it may be supposed to be owned by every

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[77] Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232.

[78] Missouri v. Dockery, 191 U. S. 165.

one alike.[79] It is not necessary in order to meet the requirement that taxes shall be proportional that the rate shall be identical in all the municipal corporations throughout the state; uniformity in each city, town or other taxing district is all that is required.[80]

46. **Exemptions.**—The property of a state or of a municipal corporation is universally held to be exempt from taxation even in the absence of a statute specifically exempting it, because it cannot be supposed that the legislature intended that property paid for by taxation should be taxed.[81] It is the law in every state that the property of charitable, educational and religious organizations shall not be taxed, and such exemptions do not violate the requirement of uniformity, because such organizations, though in a sense private, relieve the public of a burden which it would otherwise have to bear itself. It is also customary to exempt the clothes, household furniture and tools of every individual to a limited extent and such exemptions are sanctioned in part by custom and general acquiescence and in part by the slight effect that they have toward producing disproportion.

47. **Excises.**—It is nowhere required that excises must apply alike to all occupations, privileges and acts which might be the subjects of taxation, and no such requirement would be practicable. The only limits upon the discretion of the legislature in impos-

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[79] People v. McCreery, 34 Cal. 432; Hunsaker v. Wright, 30 Ill. 146; Opinions of the Justices, 195 Mass. 607, 84 N. E. 499; 208 Mass. 616, 94 N. E. 1043.

[80] Providence Institution for Savings v. Boston, 101 Mass. 575; Gilman v. Sheboygan, 2 Black 510 (U. S.).

[81] Rochester v. Rush, 80 N. Y. 302; Erie County v. Erie, 113 Pa. St. 360, 6 Atl. 136.

ing excises are that each excise must apply to all persons performing the same act or enjoying the same privilege, and a distinction founded upon an immaterial difference is consequently unconstitutional;[82] that the legislature cannot impose an unreasonable excise upon the doing of an act which it has not the power to prohibit;[83] and, it has sometimes been held, the permissible subjects of excise are confined to such undertakings as one may not lawfully follow in the exercise of a natural right without aid from the government and without affecting the rights or interests of others in such a way as properly to call for governmental regulation; and that consequently the legislature cannot constitutionally lay an excise upon such natural rights as the performance of simple labor or the making of simple contracts.[84]

48. **Notice and hearing.**—The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty or property without due process of law. In all cases of interference with property rights by public authority the owner of the property is entitled under this provision to notice and a hearing appropriate to the occasion, but when the interference consists of the levying of the annual general tax, the statute itself which provides for the time and manner of the levy is sufficient notice to the taxpayers of the assessment of the tax to satisfy the Constitution.[85]

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[82] Atchison, etc., R. R. Co. v. Clark, 60 Kan. 826, 58 Pac. 477; Muhlenbrinck v. Commissioners, 42 N. J. L. 364.

[83] See § 4.

[84] Opinion of the Justices, 196 Mass. 602, 85 N. E. 545.

[85] Merchants' Bank v. Pennsylvania, 167 U. S. 461.

The person assessed is entitled to a hearing upon the validity and amount of the tax before it is conclusively established against him;[86] but due process in matters of taxation does not necessarily mean a judicial proceeding; the Constitution is satisfied by a hearing before a board of revision or even before the assessors themselves.[87] A hearing denotes an opportunity to the taxpayer to offer evidence and submit arguments.[88]

49. **Penalty for not filing list.**—It is customary to require persons subject to taxation to furnish the assessors with a list of their taxable property and to restrict their right to an abatement if they fail to file such a list. It has been held that a provision which precludes a taxpayer from contesting an excessive tax in any form of action because he omitted from his list property which he honestly believed to be not taxable is unconstitutional;[89] but statutes which provide merely that a person failing without good cause to file any list at all shall be precluded from appealing from an adverse decision by the assessors upon his application for abatement are unobjectionable.[90]

50. **Permissible methods of collection.**—As far as the collection of taxes is concerned, due process does not require judicial proceedings, and the payment of taxes may be constitutionally enforced by distress of the goods and arrest of the person if there is an

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[86] Davidson v. New Orleans, 96 U. S. 97.

[87] Palmer v. McMahon, 133 U. S. 660; Michigan Central R. R. Co. v. Powers, 201 U. S. 245.

[88] Londoner v. Denver, 210 U. S. 373.

[89] Central of Georgia Ry. Co. v. Wright, 207 U. S. 127.

[90] Glidden v. Harrington, 189 U. S. 255; Sears v. Assessors of Nahant, 208 Mass. 208, 94 N. E. 467.

opportunity at some stage to contest the validity of the tax.[91] Taxes on land may be collected by proceedings in rem and a personal notice to the owner of land of a sale for non-payment of taxes is not essential to due process.[92] New remedies created by statute may be applied to taxes already due and penalties may be imposed applicable only to certain classes of corporations upon their failure to pay taxes when due.[93]

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[91] Palmer v. McMahon, 133 U. S. 660.

[92] Turpin v. Lemon, 187 U. S. 51.

[93] League v. Texas, 184 U. S. 156.

CHAPTER VIII.

ASSESSMENT OF TAXES.

51. **The process of assessment.**—The actual assessment of taxes is ordinarily performed by a board of local officials called assessors, who, after the city, town, county or district for which they act has voted to appropriate a certain sum from the tax levy, are charged with the duty of apportioning the sum so voted upon the persons and property subject to taxation within their district. This apportionment constitutes the assessment, and the process of assessment consists of listing the persons and items of property to be taxed, and fixing the value of such items, the tax rate being fixed by the proportion that the sum to be raised bears to the total valuation of taxable property within the district.

52. **Mandatory and directory provisions.**—The laws of each state prescribe in detail the manner in which the assessment should be made, but compliance with such provisions is not necessarily essential to the validity of a tax. All those provisions which are intended for the security of the citizen, for ensuring an equality of taxation and to enable everyone to know with reasonable certainty for what polls and for what real and personal estate he is taxed and for what all those who are liable with him are taxed are conditions precedent, and if they are not observed he is not legally taxed; but many regulations are made

by statute, designed for the information of assessors and other officers and intended to promote method, system and uniformity in the modes of procedure, the compliance or non-compliance with which in no respect affects the rights of taxpaying citizens. Such provisions may be considered directory merely, and non-compliance with them does not affect the validity of the tax.[94] The assessors may delegate the clerical work of their office to subordinates and may even divide up the different parts of the town among themselves, but each act of assessment must be the act of at least a majority of the assessors themselves.[95]

53. **Assessment made as of a certain day.**—Assessments are usually made once each year and as of a certain date in the year which determines the liability of persons and property to taxation for the year. A change in the domicile of a person or in the ownership of property after that date is not material, even if it occurs before the assessment has actually taken place.[96] In many of the states taxpayers are notified to bring in lists of their property, and are liable to various penalties if they fail to comply with the notice.

54. **Real and personal estate.**—It has been the custom from the first settlement of this country to divide taxable property into two classes, real and personal, and to assess these two classes on different principles. Real estate is assessed where it lies to

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[94] San Francisco, etc., R. R. Co. v. State Board, 60 Cal. 12; Slaughter v. Louisville, 89 Ky. 112, 8 S. W. 917; Torrey v. Millbury, 21 Pick. 64 (Mass.).

[95] People v. Hagadorn, 104 N. Y. 516, 10 N. E. 891.

[96] Harman v. New Marlborough, 9 Cush. 525 (Mass.).

the person appearing of record to be the owner, and separate parcels must be separately assessed. Personal property is assessed to the owner in the place of his domicile and may be either itemized or assessed in a lump sum, in the discretion of the assessors.

55. **Domicile.**—Every man must have a domicile; and he can have but one at any given time. His domicile is the place in which he lives with the intent to make it his home, and domicile thus embraces both act and intent.[97] One intends, however, certain things to which the law gives their necessary legal consequences, and a person who lives in a place for an indefinite period without the intent of returning to his former home acquires a domicile there regardless of his personal sentiments.[98] A person who owns dwelling houses in more than one town and occupies each of them a substantial portion of the year may as a practical matter elect in which town he shall be taxed, for his own intent in such a case is almost always decisive; and if he forms such intent while actually living in one of the houses he thereby acquires a domicile in the town in which it is situated. Motive, as distinguished from intent, is immaterial. One may change his domicile from one town to another merely to diminish the amount of his taxes if the act and intent are both present.

A domicile once established remains until a new one is acquired; and consequently one who has abandoned his original home with intent never to return does not lose his domicile until he has acquired a new one by arriving at a different place with the intent to stay there an indefinite period.[99] Domicile once acquired is presumed to continue and the burden of proof is on him who seeks to establish a change. Domicile is not lost by absence for a merely temporary purpose with intent to return. An intent to return at a remote and indefinite period will not, however, control an actual dwelling at a different place with all the characteristics of a permanent home and place of abode. In some cases domicile may be acquired without physical presence; as in the case of a minor supported by his parents, or of a married woman. In such cases the domicile generally follows that of the father or husband.

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[97] Lyman v. Fiske, 17 Pick. 231 (Mass.); Hall v. Murdock, 114 Mich. 233, 72 N. W. 150.

[98] Beecher v. Detroit, 114 Mich. 228, 72 N. W. 206.

56. **Evidence of domicile.**—A question of domicile not uncommonly requires for its solution an inquiry into the habits, character, pursuits, domestic relations and in general the whole history of the person assessed from his youth to the time of the assessment, and any evidence having a legitimate bearing upon the facts which establish domicile is admissible. Upon the question of intent the person assessed may testify himself, and he may introduce in his own favor declarations made by himself at the time he was removing or performing some other act affecting his domicile. Such declarations accompanying an act are admitted on general principles of the law of evidence as part of the *res gestae;* but mere declarations not accompanying an act are not admissible in his favor. Past declarations of the person

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[99] Warren v. Thomaston, 43 Me. 406; Borland v. Boston, 132 Mass. 89.

assessed as to his domicile or intentions may be used against him whether they accompanied an act or not, as admission against interest.

57. **Tangible personal property.**—The simple system of taxing all personal property at the domicile of the owner has been much broken in on by legislation, and it is now customary to tax machinery, stock in trade and even sometimes all tangible property in the city or town in which it is kept or maintained during the year.

58. **The tax list.**—After the assessment is completed the assessors enter it in a formal list or roll and the list is committed to another local official usually called a collector, with a warrant signed by the assessors, calling upon the collector to collect the tax. It is, however, provided in most states that even after the tax list is committed to the collector taxable property omitted from the list may be added thereto and committed to the collector by a supplemental warrant.

CHAPTER IX.

COLLECTION AND REMEDIES.

59. **Summary methods permissible.**—It has always been the practice under every form of government to enforce the payment of taxes by much more summary methods than are available to collect private debts, for if the rule were otherwise all the functions of government might be crippled by the concerted refusal of a discontented minority to pay taxes duly assessed or even by a general tendency to procrastination on the part of the taxpayers. The prompt and unembarrassed collection of taxes is considered of more importance than a possible inconvenience to one or more citizens, and there is no constitutional objection to a system by which a tax is summarily collected without recourse to judicial proceedings if the persons from whom the tax was collected have the right to recover it back in an action at law if it proves to have been wrongfully assessed.[1] A tax is not a debt and cannot be collected by an action at law unless the statutes specifically provide such a means for collection.[2]

60. **Distress and arrest.**—The primary method for the collection of taxes is by distress, that is, the seizure and sale of personal property in advance of judicial proceedings. Distress is not the enforcement

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[1] Palmer v. McMahon, 133 U. S. 660; State v. Allen, 2 McCord 55 (S. C.).

[2] Lane County v. Oregon, 7 Wall. 71 (U. S.).

of a lien, and in the absence of a statute to the contrary the property seized must be the property of the person taxed when it is seized,[3] and it need not have been the property on account of which the tax was assessed. Upon the failure of the collector to find goods to distrain he was formerly authorized almost everywhere to arrest and imprison the person of the delinquent. This method of collection has been done away with in many of the states; it is not, however, affected by a statute abolishing imprisonment for debt.[4]

61. **Tax sales.**—Taxes upon real estate are collected by a sale of the lands themselves. Real estate is subject to a lien for taxes from the date as of when the taxes are assessed which is not lost by a transfer of the property.[5] This remedy is generally in addition to the remedies against the owner, except in the case of special assessments imposed upon the land itself. The sale of land for non-payment of taxes is such an extreme interference with private property that the law guards the rights of the owner with the utmost care. The due performance of every step in the proceedings even in the most minute particulars is a condition precedent to the validity of the sale,[6] and the deed to the purchaser must contain all the recitals required by law or it will convey no title.[7] The title conveyed by a tax deed is a new and para-

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[3] Jaffray v. Anderson, 66 Iowa 718, 24 N. W. 527.

[4] Poll-Tax, Collection of, 21 R. I. 582, 44 Atl. 805.

[5] Osterberg v. Union Trust Co., 93 U. S. 424.

[6] Lyon v. Alley, 130 U. S. 177; Brown v. Veazie, 25 Me. 359; Wilson v. Doe e. d. Bell, 7 Leigh 22 (Va.).

[7] Duncan v. Gillette, 37 Kan. 156, 14 Pac. 479; Dameron v. Jamison, 143 Mo. 483, 45 S. W. 258.

mount title and not a sum of all the existing interests in the property, and it wipes out all existing liens, leases, mortgages, easements or restrictions.[8] After the sale the owner is allowed a certain period in which to redeem the property, and the statutes giving the right of redemption are liberally construed in favor of the owner.[9] The right of redemption extends to all persons having an interest in the property in question.

62. **Petition for abatement.**—In every state there is provision made by statute for the abatement of taxes on petition of the person assessed. Such petition is in some states heard by the assessors themselves, in some by a higher board of administrative officers, and in some by a court; but there is no constitutional right to a hearing by a judicial body. Findings of fact by the designated tribunal are final, but rulings of law may be taken by certiorari to the highest court of the state. Petition for abatement is the only remedy for an excessive tax, whether the fault is in including property not owned by the person assessed, or in valuing too high the property he owns.[10] If he fails to apply for abatement he cannot show that the tax was excessive even in proceedings to enforce its collection.

63. **Suit against town.**—If a tax is wholly invalid by reason of having been assessed either under an unconstitutional statute, or without compliance with some mandatory provisions of law, or for an illegal

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[8] Hefner v. Northwestern Life Insurance Co., 123 U. S. 747.

[9] Gault's Appeal, 33 Pa. St. 94.

[10] Beeson v. Johns, 124 U. S. 56; In re Munn, 165 N. Y. 149, 58 N. E. 881.

purpose, or upon a person not subject to taxation in the city or town in which it was assessed, and has been collected by compulsory process, the person assessed may recover the sum so collected in an action in the nature of assumpsit for money had and received against the city or town.[11] He cannot, however, sue the city or town in tort and recover damages for imprisonment or for the value of goods distrained.[12]

64. **Injunction.**—It is the original and sounder rule that for reasons of public policy equity will not interfere with the collection of taxes, at any rate unless one of the recognized grounds of equity jurisdiction is present.[13] Ordinarily the person assessed has an adequate remedy at law, by paying the tax under duress and recovering it back. In many jurisdictions, however, this rule has been broken in on so frequently that an injunction is the usual recourse of a person confronted with a demand for the payment of an illegal tax.

65. **Suit against assessors.**—An action in tort will lie against assessors for the illegal assessment of a tax, as when they fail to comply with the provisions of statute, or when the purpose of the tax is illegal, or the person assessed was not subject to taxation in their district.[14] They are not liable for irregularities in the vote of the town, or for errors of judgment

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[11] Avery v. East Saginaw, 44 Mich. 587, 7 N. W. 177; Bruecher v. Port Chester, 101 N. Y. 240, 4 N. E. 272.

[12] Lorillard v. Monroe, 11 N. Y. 392.

[13] Cooley, Taxation (3rd ed.), pp. 1411-1461; Loud v. Charlestown, 99 Mass. 208.

[14] National Bank v. Elmira, 53 N. Y. 49.

in assessing a person subject to their jurisdiction.[15] The collector is protected by his warrant if it is good on its face, and is not liable for any irregularity in the assessment.[16] He is liable for enforcing a warrant invalid on its face or for violating the provisions of law relating to the collection of taxes.[17]

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[15] State v. Reed, 159 Mo. 77, 60 S. W. 70; Fawcett v. Dole, 67 N. H. 168, 29 Atl. 693; Williams v. Weaver, 75 N. Y. 30.

[16] Nowell v. Tripp, 61 Me. 426; Abbott v. Yost, 2 Denio 86 (N. Y.).

[17] Kean v. Kinnear, 171 Pa. St. 639, 33 Atl. 325.

CHAPTER X.

SPECIAL ASSESSMENTS.

66. **Special assessments constitutional.**—In view of the early development of special assessments and their long and unquestioned usage, it is not surprising that when objection to the constitutionality of this form of taxation was finally made it was not sustained by the courts. It was universally held that none of the requirements of the Constitution were violated by a tax levied for public purposes of a local character although imposed only on a certain town or district or on persons residing or owning property in a particular locality, and that an assessment made on persons in respect of their ownership of certain property which received a peculiar benefit from the expenditure of the money raised by the tax or by reason of their residence in the vicinity of a proposed public improvement and the special advantage or convenience which will accrue to them and their property therefrom, is not invalid, although it does not operate on all persons and property in the community in the same manner as taxes levied for general purposes.[18] Although special assessments are not in themselves unconstitutional, the opportunity for unfairness and oppression offered by their use is so much greater than is offered by general taxation that the constitutional provisions affecting the power

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[18] People v. Brooklyn, 4 N. Y. 419; Dorgan v. Boston, 12 Allen 223 (Mass.).

of taxation have been liberally construed in favor of the individual in their application to special assessments.

67. **Public use required.**—The well established principle that public funds raised by taxation cannot be devoted to any use not public is not limited in its application to funds raised by general taxation, but applies to special assessments as well.[19]

68. **Benefit must be local.**—A public improvement, to be the basis of a special assessment, must have an actual and beneficial effect upon a well defined and limited area. The only departure permissible from the system of general taxation by which all the property in a given territorial unit is assessed at a uniform rate is the local special assessment justified by the local character of the improvement.[20] The general benefit to all the property in a city or town arising from a particular public improvement must be met by general taxation.

69. **Lawful objects of assessments.** — Certain classes of public undertakings are not in the nature of things proper objects of special assessments; but for others if they do in fact confer a benefit of a local character a special assessment can be constitutionally levied. In the latter class, it has been held, fall the construction and alteration of public streets, the construction of sewers for house sewage and drains for surface water; the construction of sidewalks, of parks and even of railroad stations.[21] Ordi-

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[19] Morse v. Stocker, 1 Allen 150 (Mass.).

[20] State v. Reis, 38 Minn. 371, 38 N. W. 97.

[21] Cooley, Taxation (3rd ed.), pp. 1159-1179.

narily local benefit is not derived from a public improvement unless it is constructed, but there may be improvements of such a nature that the mere formal laying out confers a benefit, and the construction may confer another benefit.[22] Local benefit, to be the basis of an assessment, need not be of a permanent character, and assessments have been sustained for watering a street or for maintaining a sewer. It is no objection to the validity of an assessment that the owner of the land assessed has no legal right to have the improvement for which he is assessed maintained forever.[23]

70. **Assessment must not exceed the cost.**—The assessment must not exceed the cost of the improvement. A special assessment is a tax and the benefit is estimated only as a means of apportioning the tax and providing a fixed limit of the amount to be assessed upon each estate. The fact of such benefit from the improvement furnishes a justification for the imposition of the tax upon a particular class of estates instead of a levy in the general way of ordinary taxation, but such benefit would not of itself warrant the exaction of money by way of compensation therefor. The estates are assessed not for the benefit conferred but for the cost of the public improvement. The essential point in the proceeding is the expenditure for a public service for which taxation in some form is required.[24]

In ascertaining the cost which is to be the basis of an assessment and the benefit in accordance with which the whole or part of the cost is to be assessed, there is no objection to joining different features of what are really part of the same public improvement. There is no constitutional objection to the enactment of a statute authorizing the levying of an assessment for a public improvement completed before the enactment of the statute,[25] even if changes of ownership in the lands assessed have intervened, and the reassessment of an assessment held void for irregularity or error is equally unobjectionable.

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[22] Foster v. Park Commissioners, 133 Mass. 321.

[23] Sears v. Street Commissioners, 180 Mass. 274, 62 N. E. 397.

[24] People v. McWethy, 165 Ill. 222, 46 N. E. 187; State v. District Court, 80 Minn. 293, 83 N. W. 183.

71. **Relation of assessment to benefit.**—It has long been a mooted point among constitutional lawyers in the country at large whether a special assessment can be constitutionally imposed upon a parcel of land in accordance with a rule which excludes all inquiry upon the question of actual benefits and which may result in the assessment of an amount in substantial excess of such benefits. Many eminent authorities, among them the Supreme Court of the United States, hold that it is no violation of the general prohibitions of the Fourteenth Amendment to the United States Constitution or of similar provisions of the constitutions of the states if the legislature designates a certain area as benefited by a public improvement and directs that the whole or a part of the cost of the improvement be assessed upon the various parcels of land situated within the designated area in proportion to the size, frontage or value of the respective parcels,[26] unless it plainly appears

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[25] Seattle v. Kelleher, 195 U. S. 351.

[26] French v. Barber Asphalt Paving Co., 181 U. S. 324.

that the so-called assessment is an abuse and not an exercise of the taxing power and a mere act of confiscation under the guise of law.[27]

In some of the states, however, it has in recent years become definitely settled that the provisions of the state constitution protect an owner of land from being obliged to pay a special assessment in excess of the benefit actually received by his land. Even an assessment of the whole or a specified portion of the cost of a public improvement upon the parcels benefited in proportion to the benefits actually received cannot be sustained unless it can be inferred from the statute authorizing such assessment that the actual benefit to each parcel assessed is not to be exceeded.

While the statutes have in some instances required the assessing board to determine the actual benefit to each parcel assessed, even those courts which have adopted the stricter rule have recognized that the accurate ascertainment of the exact amount of benefit may be no easy matter and have sanctioned the adoption of rules-of-thumb which reach reasonably correct results, especially when such rules are authorized by the legislature itself and have been employed for many years without objection. Assessments proportioned to the area, the valuation or the frontage of the parcels of land affected by a public improvement were all sustained as valid almost everywhere before the stricter rule was adopted, and it is still held that in thickly settled localities, where the different parcels of land are of the same general character, such methods of assessment may be treated as reasonably accurate schemes of ascertaining the actual benefit. In the absence of evidence that assessments by such methods work actual injustice the court will not assume that they are invalid or set them aside at the complaint of an owner who is not himself aggrieved; but such an assessment it is held cannot be constitutionally enforced upon an estate which is assessed more than it is in fact benefited. An assessment made in accordance with a method which is plainly likely to result in disproportionate taxation may be treated as invalid in any proceeding in which it comes before the court, and the application of one of the customary methods to a whole municipality which contains districts of divergent characteristics falls within the scope of this principle.[28]

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[27] Norwood v. Baker, 172 U. S. 269.

72. **Hearing.**—It is now well settled that no statute is constitutional which authorizes the final and conclusive determination of the amount of the assessment upon each parcel of land without giving the owner of such land an opportunity for a hearing.[29] It is not, however, necessary that the owner be heard when the assessment is made in the first instance if he is given an opportunity for application for abatement or for appeal.[30]

It is sometimes provided that the application for abatement may be heard by a jury, but it is well settled that there is no constitutional right to a jury trial in such cases, or even to a hearing before a judicial tribunal. The hearing may be before the board which made the original assessment, or before another board which while acting judicially in this instance is not a court and is composed of executive officers.[31] The findings of fact of such boards are conclusive and cannot be contested in courts of law. The law must entrust the final disposition of such questions to some one and it is at least as satisfactory to entrust it to a tribunal of experts responsible to the people as to a court or jury.

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[28] White v. Gove, 183 Mass. 333, 67 N. E. 359; New York, etc., R. R. Co. v. Kearney, 55 N. J. L. 463, 26 Atl. 800; Philadelphia v. Rule, 93 Pa. St. 15.

[29] Spencer v. Merchant, 125 U. S. 345.

[30] Hodge v. Muscatine County, 196 U. S. 276.

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[31] Hibben v. Smith, 191 U. S. 310.

CONSTITUTIONAL LAW

PART VI

NATURALIZATION

BY

GEORGE F. TUCKER, A.B., LL.B., PH.D.*

CHAPTER I.

EXPATRIATION DEFINED AND EXPLAINED.

1. **The doctrine of perpetual allegiance.**—Expatriation is the abandonment of one's nationality. There was long a difference of opinion as to whether the doctrine of perpetual allegiance to a country was tenable and as to whether a free person had a right to leave the country of his birth and become a citizen of a country which was willing to naturalize him. Great Britain long adhered to the rule of perpetual allegiance, and her impressment upon the high seas of naturalized American citizens of British birth was the chief cause of the war of 1812. The question was settled in this country by an Act of Congress passed in 1868[1] declaring that "the right of expatriation is

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[1] Now U. S. Rev. Stats., § 1999.

a natural and inherent right of all people." It is provided that naturalized citizens of the United States, while in foreign countries, shall receive from this government the same protection as native-born citizens,[2] and that American citizens unjustly deprived of liberty by a foreign government shall receive the protection of the United States.[3] Great Britain in 1870 passed an act permitting the expatriation of British subjects. It is to be noted that desertion from the army or navy of the United States forfeits the rights of citizenship.[4]

2. **Treaties recognizing expatriation.**—The statutes permitting expatriation are what are termed municipal law and would have no force in foreign countries, if inconsistent with their laws. To make them effective, treaties recognizing expatriation were entered into by the United States with various foreign powers, notably with Great Britain. They provide generally that citizens of one country who have resided in the other uninterruptedly for a certain period, and during such period have become naturalized, are citizens thereof; that the declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization; that a naturalized citizen of one country, on returning, is liable to trial and punishment for an action committed before his emigration; as, for example, military duty, although in many treaties there is a modification of this rule; that the conventions between the two countries as to the mutual

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[2] U. S. Rev. Stats., § 2000.

[3] U. S. Rev. Stats., § 2001.

[4] U. S. Rev. Stats., § 1998.

delivery of criminals are to remain in force; and that the emigrant from the one state, who becomes a citizen of the other, shall not, on returning to his original country, be constrained to resume his former citizenship, yet he may of his own accord acquire it.[5]

3. **Methods of expatriation.**—Naturalization, as will hereinafter be seen, is the most common mode of expatriation. For many years questions arose as to whether Americans had divested themselves of citizenship by taking the oath of allegiance to foreign states. The decisions of the executive departments were not in harmony; but it is now declared that "any American citizen shall be deemed to have expatriated himself," (1) by becoming naturalized in a foreign state, (2) by taking an oath of allegiance to a foreign state, (3) by residing for two years in the foreign state from which he came, or five years in any other foreign state, provided that the presumption may be overcome by satisfactory evidence, and that there shall be no expatriation when this country is at war, and (4) by the marriage of an American woman to a foreigner, she being permitted to resume her American citizenship at the termination of the marital relation.[6]

4. **Same subject—Executive order of the president.**—The above provision (3) as to residence in a foreign state necessitated an executive order directing changes in the diplomatic and consular regulations, and under date of April 19, 1907, circular instructions were issued by the Department of State

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[5] Van Dyne, Naturalization, pp. 441-473.

[6] Act of Mar. 2, 1907, §§ 2, 3, 34 U. S. Stats. at Large, p. 1228.

to diplomatic and consular officers declaring that the presumption that one has ceased to be an American citizen may be overcome by establishing,

"(a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or

"(b) That his residence abroad is in good faith, for reasons of health or for education, and that he intends eventually to return to the United States to reside; or

"(c) That some unforeseen or controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause."[7]

5. **When expatriation is not effected.**—Generally expatriation is not effected if ill health or pecuniary trouble renders it impossible for a person to return to this country; if the person resides abroad only as the agent or representative of an American business or is a missionary, who does not intend to abandon his nationality.

There are decisions that merely entering into the military or naval service of a foreign government does not accomplish expatriation. There are also rulings that, if the law of the foreign government confers citizenship on the volunteer in consideration of his enlisting, expatriation is complete. Accepting public office under a foreign government may or may not effect expatriation. If such acceptance is in violation of the laws of the person's own government and without its permission, then expatriation is effected. It is to be noted that if, in so accepting office, an oath of allegiance to the foreign country is required, there can be no question as to expatriation.[8]

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[7] Van Dyne, Naturalization, p. 342.

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[8] Chap. I, § 3.

CHAPTER II.

COLLECTIVE NATURALIZATION—METHODS ENUMERATED.

6. **Collective naturalization defined.**—As will be hereinafter seen, the usual method of naturalization is by the voluntary petition of an alien conformably to the laws of the country whose citizen he desires to become. However, the people resident in a district or country may become citizens of another country without any action on their part. This is collective naturalization and may be defined as the governmental proceeding whereby the inhabitants of a territory collectively or certain classes of such inhabitants have citizenship conferred upon them without action on their own part. In this country this method of naturalization is not unusual and may be accomplished by conquest, by treaty, by special act of Congress, and by admission of new states.

7. **Naturalization by conquest.**—The nationality of the inhabitants of territory acquired by conquest becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided. The Constitution confers upon the government of the United States authority to make treaties, and the power to acquire territory is an incident of national sovereignty. "By the general principles of the law of nations every government which is sovereign within its sphere of

action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. * * * Wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power, in the absence of stipulations upon the subject."[9]

8. **Naturalization by treaty.**—"Where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, incorporation does not arise until, in the wisdom of Congress, it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family."[10] However, in treaties ceding territory, provisions are generally inserted determining the status of its inhabitants in the acquiring state. In the treaty of 1898, by which Spain ceded Porto Rico and the Philippine Islands to the United States, it was provided that Spanish subjects, natives of the Peninsula, residing in the territory ceded, might, by conforming with certain conditions, preserve their allegiance to Spain, but that the status of the natives should be determined by Congress. By the treaty of 1794 with Great Britain, British subjects continuing to reside at Detroit, without declaring their intention within a year of remaining British subjects, became American citizens.

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[9] Downes v. Bidwell, 182 U. S. 244, 300.

[10] Downes v. Bidwell, 182 U. S. 244, 339.

9. **Same subject.**—By the treaty of 1803 with France, it was provided that inhabitants of Louisiana should be admitted to all the rights of citizens of the United States. The treaty of 1819 with Spain, ceding Florida, contains a similar provision. By the treaty of 1848 with Mexico, inhabitants of California and other ceded territory were allowed to elect whether they would retain the rights of Mexican citizens, or acquire those of citizens of the United States. By the treaty of 1867 with Russia, ceding Alaska to the United States, the inhabitants might remain Russian subjects by returning to Russia, but those remaining, except uncivilized native tribes, were to become citizens of the United States. Before 1871, Indians remaining behind on the removal of their tribes westward were by treaty declared citizens, and individuals were authorized to become citizens on applying for naturalization; but in 1871 it was declared that Indians should be dealt with in the future by the Congress, and not by treaty.

10. **Naturalization by special acts of Congress.**—Occasionally naturalization is conferred by special acts of Congress, as in the cases of the admission of certain aliens to citizenship in 1802 and 1816, in the case of the enactment in 1872, providing that "all persons born in the district or country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States on the 18th of May, 1872, are citizens of the United States in the same manner as if born elsewhere in the United States;" in the case of an enactment in 1900, after the annexation of Hawaii, declaring that residence there before May

14, 1900, was the same as residence in the United States and in the Territory of Hawaii, and no declaration of intention was required of those who had resided in the islands at least five years prior to said May 14; in the case of an American woman who had married a British subject and was, after his death, re-admitted to citizenship by a joint resolution of Congress in 1898, conformably to the treaty of 1870 with Great Britain, and in the case of Indians, many of whom were made citizens or were authorized to become citizens by acts of Congress.

11. **Naturalization by admission of new states.**—The Constitution of the United States provides that "new states may be admitted by the Congress into this union * * * the Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."[11] Those who were citizens of the original thirteen states became citizens of the United States when the Constitution was adopted. In the case of the northwest territory the ordinance of 1787 made provision for the election of representatives by free male inhabitants, of full age, and for the forming in the territory of not less than three, nor more than five, states.[12] Inhabitants other than those who were originally citizens of the United States came within the meaning of the ordinance and later enabling acts of Congress.[13] So the treaties of 1803 and 1819, relative to Louisiana and Florida, respectively, provided that all the inhabitants of the

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[11] Art. IV, § 3.

[12] U. S. Rev. Stats., pp. 13-16.

[13] Van Dyne, Naturalization, p. 325.

ceded territories should be admitted to all the rights of citizenship. So, also, in the case of the annexation of Texas, under a joint resolution of Congress in 1845. "Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that, in the admission of a state, a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission."[14]

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[14] Boyd v. Thayer, 143 U. S. 135, 170.

CHAPTER III.

NATURALIZATION ACCORDING TO FEDERAL LAWS—PRELIMINARY METHOD OF PROCEDURE.

12. **Naturalization defined.**—Naturalization may be defined as the act of investing an alien with all the rights of a native-born citizen or subject; or, more briefly stated, it is the act by which an alien is made a citizen of another country. In the United States power to naturalize is vested in Congress, the Constitution providing that "The Congress shall have power * * * to establish an uniform Rule of Naturalization." It has been repeatedly held that the states cannot exercise this power. It is said by Chief Justice Marshall that "a naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native

might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none."[15]

13. **Same subject—Federal statutes.**—The states may confer upon aliens the rights of their own citizens, as to hold property, real or personal, and generally to participate in the affairs of government. But it is well said that aliens are not thus made citizens of the United States, nor are they entitled to the rights of citizens of other states. There are constitutional prohibitions. It is provided that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" and "the right of citizens of the United States to vote shall not be denied or abridged by * * * any state on account of race, color, or previous condition of servitude."[16]

Early federal statutes providing for naturalization are those of 1790, 1795 and 1802. The enactments on the subject appear in Title XXX of the United States Revised Statutes. A few statutes were added in later years, and, the system having become so lax and frauds so numerous, the whole subject was modified and enlarged under a stricter statute of 1906, which has been slightly amended by later acts. The Bureau of Immigration and Naturalization has charge of all matters of naturalization under the Secretary of Commerce and Labor, who is directed to provide the Bureau with offices and all facilities for the discharge of its duties.[17] He shall make regulations to carry into execution the provisions of the act, and certified copies of all documents under the act shall be admitted in evidence equally with the originals.[18]

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[15] Osborn v. United States, 9 Wheat. 738, 827 (U. S.).

[16] U. S. Const., Amends. XIV, § 1; XV, § 1.

[17] Act of June 29, 1906, §§ 1 and 2, 34 U. S. Stats. at Large, p. 596.

14. **Courts authorized to naturalize.**—Naturalization is conferred by Congress on the courts, and hence is a judicial function. Jurisdiction to naturalize is given to the "United States circuit and district courts now existing, or which may hereafter be established by Congress in any state, United States district courts for the territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the Supreme Court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited"; jurisdiction "shall extend only to aliens resident within the respective judicial districts of such courts," and the courts shall be furnished by the Bureau of Immigration and Naturalization with the necessary blank forms. It is also provided that all certificates of naturalization are to be consecutively numbered and printed on safety paper.[19]

15. **Who may be naturalized.**—The naturalization laws are not extended to all aliens. They "apply

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[18] Act of June 29, 1906, § 28, 34 U. S. Stats. at Large, p. 606. Compare regulations which were issued Oct. 1, 1912. This is a valuable summary and may be obtained from the clerks of the U. S. Circuit Courts. It is cited herein as Naturalization Regulations, 1912.

[19] Act of June 29, 1906, § 3, 34 U. S. Stats. at Large, p. 596.

to aliens being free white persons, and to aliens of African nativity, and to persons of African descent."[20] There are decisions to the effect that Japanese, Hawaiians, Burmese and Indians cannot be naturalized, although there are exceptions as to Indians in the case of treaties and special laws.[21] "No state court or court of the United States shall admit Chinese to citizenship."[22] Parsees, Syrians and Armenians have been admitted to citizenship. A Mexican has been naturalized, and it has been thought that Porto Ricans and Filipinos might be also, as it is provided that the naturalization laws are extended to "all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States," with certain modifications.[23] However, it has been held that Congress did not intend to extend the privilege of citizenship to those who had become citizens of the Philippines under the Act of 1902 (providing for administration) unless they were free white persons or of African nativity or descent.[24] Alien enemies are incapable of naturalization.[25] There seems to be no objection to the naturalization of an alien unmarried woman, and a married woman may be naturalized, but probably not against the consent of her husband. The alien wife of an alien husband cannot be naturalized.[26] Anarchists and polygamists are denied naturalization.[27]

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[20] U. S. Rev. Stats., § 2169 as amended by 18 U. S. Stats. at Large, p. 318.

[21] See Chap. II, §§ 9, 10.

[22] Act of May 6, 1882, 22 U. S. Stats. at Large, p. 61.

[23] Act of June 29, 1906, § 30, 34 U. S. Stats. at Large, p. 606.

[24] In re Alverto, 198 Fed. 688.

[25] U. S. Rev. Stats., § 2171.

16. **Declaration of intention.**—Commissioners of Immigration shall make a registry in a book of record in the case of each alien arriving in the United States "of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes," and they shall give to such alien a certificate of such registry.[28]

The alien shall declare on oath before the clerk or deputy of the court, in the district in which he resides, two years at least before admission, and after he has reached eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce allegiance to foreign potentates or states, naming particularly the potentate or state of which he is then a citizen or subject, and the "declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came," and his present place of residence. No alien who, conformably to law at the date of his declaration, has declared his intention shall be required to renew such declaration.

Any person authorized under existing law to become a citizen who has resided constantly in the United States for five years next preceding the first day of May, 1910, who, because of misinformation, has acted under the impression that he was or could become a citizen and has in good faith exercised the rights of a citizen or intended citizen, because of such wrongful information, may, upon making a satisfactory showing, and the court believes that such person has been for more than five years entitled upon proper proceedings to be naturalized, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by such person of his intention to become a citizen, but such applicant shall comply in all other respects with the law relative to the issuance of final papers of naturalization.[29] The declaration shall be made in the clerk's office or in open court and may be made immediately after an alien arrives in this country.

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[26] Van Dyne, Naturalization, p. 51; United States v. Cohen, 179 Fed. 834.

[27] Act of June 29, 1906, § 7, 34 U. S. Stats. at Large, p. 598.

[28] Act of June 29, 1906, § 1, 34 U. S. Stats. at Large, p. 596.

17. **Form of declaration of intention.**—Substantially the following form of declaration of intention shall be used:

Declaration of Intention.

(Invalid for all purposes seven years after the date hereof.)

............, ss:

I, ..., aged ...... years, occupation ......, do declare on oath (affirm) that my personal description is: Color ....., complexion ....., height, ..., weight ....., color of hair ....., color of eyes ....., other visible distinctive marks .....; I was born in ..... on the ..... day of ....., anno Domini .....; I now reside at .....; I emigrated to the United States of America from ..... on the vessel .....; my last foreign residence was ...... It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ....., of which I am now a citizen (subject); I arrived at the (port) of ....., in the State (Territory or District) of ....., on or about the ..... day of ....., anno Domini .....; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

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[29] Act of June 29, 1906, § 4, First, 34 U. S. Stats. at Large, p. 596, as amended by the Act of June 25, 1910, § 3, 36 U. S. Stats. at Large, p. 830.

(Original signature of declarant) ....

Subscribed and sworn to (affirmed) before me this ..... day of ....., anno Domini ......

[L. S.] ....,

(Official character of attestor.)[80]

Aliens must sign their names in full and without abbreviation, and the entries of their names by the clerk must correspond.[81]

18. **Exceptions to the requirements of declaration of intention.**—Any alien of twenty-one and upward, of either regular or volunteer forces of the United States, honorably discharged, of good moral character and of one year's residence or more within the United States previous to his application, may be admitted to citizenship, upon his petition, without any previous declaration; but the court must be sat-

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[80] Act of June 29, 1906, § 27, 34 U. S. Stats. at Large, p. 603.

[81] Naturalization Regulations, 1912, rule 20.

isfied of such person's having been honorably discharged.[32] Any alien of twenty-one and upward, having served five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, of good moral character and honorably discharged, may also, upon his petition, be admitted to citizenship, without a previous declaration of intention; but the court must be satisfied of such person's service and honorable discharge.[33] When any alien, who has declared his intention, dies before he is naturalized, his widow and minor children may, by complying with the other provisions of the act, be naturalized without making a declaration of intention.[34] When any alien, who has declared his intention, becomes insane before naturalization, and his wife afterwards makes a homestead entry under United States laws, she and their minor children may, by complying with the other provisions of law, be naturalized without making any declaration of intention.[35]

19. **Rights acquired by the declaration of intention.**—The declarant is entitled to pre-empt and acquire public lands[36] and to political and legal rights in certain states. But the declaration does not confer citizenship.[37] Differences have arisen over the claim of declarants of intention to the protection of this country when outside its limits. The cases of

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[32] U. S. Rev. Stats., § 2166; Naturalization Regulations, 1912, rule 24.

[33] Act of July 26, 1894, 28 U. S. Stats. at Large, p. 124; Naturalization Regulations, 1912, rule 24.

[34] Act of June 29, 1906, § 4, Sixth, 34 U. S. Stats. at Large, p. 596.

[35] Act of Feb. 24, 1911, 36 U. S. Stats. at Large, p. 929.

[36] U. S. Rev. Stats., § 2289.

[37] Minneapolis v. Reum, 56 Fed. 576, 580.

Burnato, a Mexican, and Koszta, an Austrian, led to warm international disputes, but it is well established that the declarant is not clothed with the rights of citizenship, and, indeed, many treaties provide that the declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization. The Secretary of State is now authorized, in his discretion, to issue a passport to a declarant, who has resided in the United States for three years, entitling him to the protection of the government in any foreign country, except that in which he was a citizen before his declaration, such passport not to be valid for more than six months, and not to be renewed.[38] So an alien seaman, who declares his intention of becoming a citizen, and who for three years subsequent thereto serves on a merchant vessel of the United States, may be admitted to citizenship.[39]

Interesting questions have arisen as to the status of minor children of aliens who have merely declared their intention to become citizens. It is held that such minors acquire an inchoate (imperfect) status by their parent's declaration, which status they may repudiate on reaching twenty-one and accept allegiance to some foreign power.[40] And now it is provided that where an alien files his preliminary declaration and sends for his wife and children, who are affected with a contagious disorder, they may be deported.[41]

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[38] Act of Mar. 2, 1907, § 1, 34 U. S. Stats. at Large, p. 1228.

[39] U. S. Rev. Stats., § 2174.

[40] Boyd v. Thayer, 143 U. S. 135.

[41] Act of Mar. 3, 1903, § 37, 32 U. S. Stats. at Large, p. 1221.

CHAPTER IV.

PROCEDURE IN COURT.

20. **Petition for naturalization.**—Not less than two or more than seven years after the alien has made his declaration he shall file, in duplicate, a petition in his own handwriting, duly verified, stating his full name, residence by street and number, if possible, occupation, and, if possible, date and place of birth, place from which he emigrated, date and place of arrival and, if through a port, the name of the vessel, the time when, and place, and name of court where he declared his intention, if married, the name of his wife, and, if possible, her native country and her present place of residence, and, if he has children, the name, date, and place of birth and of residence of each child then living, provided that if he filed his declaration before September 27, 1906, he need not sign the petition in his own handwriting. The petition shall set forth that the applicant is not a disbeliever in or opposed to organized government, or affiliated with any organization opposed thereto, that he is not a polygamist or believer in polygamy, that it is his intention to become a citizen, to renounce allegiance to any foreign power, naming particularly the potentate or state of which he is then a citizen or subject, to reside here permanently, and whether or not he has been denied admission as a citizen, and,

if so, the grounds thereof, the court in which the decision was rendered, that the cause has been removed, and every fact material to his naturalization and required to be proved upon the final hearing.[42]

21. **Form of petition.**—Substantially the following form of petition for naturalization shall be used:

Petition for Naturalization.

...... Court of ....

In the matter of the petition of ...., to be admitted as a citizen of the United States of America.

To the ...... Court:

The petition of .... respectfully shows:

First. My full name is ....

Second. My place of residence is number .... street, city of ......, State (Territory or District) of ....

Third. My occupation is ....

Fourth. I was born on the ...... day of ...... at ....

Fifth. I emigrated to the United States from ......, on or about the ...... day of ......, anno Domini ......, and arrived at the port of ......, in the United States, on the vessel ....

Sixth. I declared my intention to become a citizen of the United States on the ...... day of ......, at ......, in the ...... court of ....

Seventh. I am .... married. My wife's name is .... She was born in ...... and now resides at .... I have ...... children, and the name, date, and place of birth and place of residence

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[42] Act of June 29, 1906, § 4, Second, 34 U. S. Stats. at Large, p. 596.

of each of said children is as follows: ....;
............; ....

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ......, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since ......, anno Domini ......, and in the State (Territory or District) of ...... for one year at least next preceding the date of this petition, to wit, since ..... day of ....., anno Domini .....

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the ...... court of ...... at ......, and the said petition was denied by the said court for the following reasons and causes, to wit, ..., and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Commerce and Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated ....

............., ss:

(Signature of petitioner)..................

............., being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ...... day of ......, anno Domini ....

[L. S.] ....,

Clerk of the ...... Court.[43]

22. **Affidavit of witnesses, form thereof and certificate from Department of Commerce and Labor.**—The petition shall be verified by affidavits of at least two credible witnesses, citizens of the United States, stating they know the applicant to have resided in the United States for at least five years continuously, and in the state, territory or district, in which the application is made for at least one year immediately preceding the filing of the petition. The witnesses must swear that he is a person of good moral character and qualified for citizenship. There shall also be filed with and attached to the petition the applicant's declaration of intention together with a certificate from the Department of Commerce and Labor, if he arrives in the United States after September 27, 1906. This must state the date, the place and the manner of arrival.[44]

The following is the form of affidavit of witnesses:

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[43] Act of June 29, 1906, § 27, 34 U. S. Stats. at Large, p. 603.

[44] Act of June 29, 1906, § 4, Second, 34 U. S. Stats. at Large, p. 596.

Affidavit of Witnesses.

...... Court of ....

In the matter of the petition of .... to be admitted a citizen of the United States of America.

............, ss:

............, occupation ....., residing at ....., and ...., occupation ......, residing at ......, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known ...., the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of ..... years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

....

....

Subscribed and sworn to before me this ...... day of ......, nineteen hundred and ....

[L. S.] ....,

(Official character of attestor.)[45]

23. **Filing of petition, notice thereof and fees to be deposited by petitioner.**—Petitions may be filed during term time or vacation and final action shall be had on stated days but not until at least ninety

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[45] Act of June 29, 1906, § 27, 34 U. S. Stats. at Large, p. 603.

days after filing and posting the notice, and no person shall be naturalized by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. The court may, upon petition of the alien, make a decree changing his name, and his certificate of naturalization shall be issued accordingly.[46] The clerk shall after filing the petition give notice by posting in his office or in the building the name, nativity and residence of the alien, the date and place of arrival, the date for the hearing, the names of the witnesses, and, if the applicant requests, issue a subpoena for the witnesses; but, if they cannot be produced, other witnesses may be summoned.[47] The petitioner shall deposit with the clerk a sum of money for the expenses of subpoenaing and paying the legal fees of witnesses, for whom he may request a subpoena; and from this deposit they shall be paid upon their final discharge, the residue to be returned to the petitioner.[48]

24. **Proceedings in court.**—The hearing must be in open court, every final order shall be under the hand of the court and entered in full upon a record, and the applicant and witnesses shall be examined under oath.[49] No alien shall be naturalized who cannot speak English, unless physically incapacitated; but this requirement shall not apply to any alien who, prior to September 27, 1906, declared his intention to become a citizen, or to aliens who shall, after the passage of this act, declare their intention

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[46] Act of June 29, 1906, § 6, 34 U. S. Stats. at Large, p. 598.

[47] Same, § 5, 34 U. S. Stats. at Large, p. 598.

[48] Same, § 13, 34 U. S. Stats. at Large, p. 600.

[49] Same, § 9, 34 U. S. Stats. at Large, p. 599.

and make homestead entries on the public lands.[50] The petitioner shall declare on oath that he will support the Constitution of the United States and that he renounces allegiance to foreign potentates and powers, naming particularly the potentate or state of which he is then a citizen or subject, and that he will support and defend the Constitution and laws of the United States against all enemies.[51] He must have some comprehension of what the Constitution is, and, if he cannot read or write English, but has read the Constitution in a foreign language and knows that there is a President, but does not know his name, he is not fit for citizenship.[52] The alien must further renounce his hereditary title or order of nobility, if he is entitled to any, and his renunciation shall be recorded in the court.[53]

25. **Same subject.**—It shall appear "that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory, where such court is at the time held, one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." The testimony of the witnesses as to residence, moral character, and attachment to the Constitution is required, and the name, place of resi-

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[50] Same, § 8, 34 U. S. Stats. at Large, p. 599.

[51] Same, § 4, Third, 34 U. S. Stats. at Large, p. 596.

[52] Re Kanaka Nian, 6 Utah 259, 21 Pac. 993.

[53] Act of June 29, 1906, § 4, Fifth, 34 U. S. Stats. at Large, p. 596.

dence, and occupation of each witness shall be recorded.[54]

It is sufficient so long as there are two witnesses testifying as to each fraction of the period of five years, so as to cover the whole.[55] If an alien returns to and remains in his native country for four years, where his family has always lived, he resuming his occupation there, he cannot claim residence here during that time.[56] The fact that an alien within the five years returned temporarily to his native country, without intending to remain or abandon his residence in this country, does not defeat his right to naturalization.[57] The denial of the petition is justified in the case of a perjurer;[58] in the case of an alien pleading guilty to murder in the second degree,[59] and in the case of an alien who, within the period of five years, has been convicted of illegally selling liquor.[60]

If the petitioner has not resided in the state, territory, or district for five years immediately preceding the filing of his petition, he may establish by two witnesses, in his petition and at the hearing, the time of his residence within the state, if for more than one year; and the remaining portion of his five years' residence within the United States may be proved by the depositions of two or more witnesses, citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district, in which the witnesses reside.[61] The United States may appear and examine the petitioner and witnesses and may call witnesses and produce evidence in opposition.[62]

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[54] Act of June 29, 1906, § 4, Fourth, 34 U. S. Stats. at Large, p. 596; U. S. Rev. Stats. § 2170.

[55] In re Godlover, 181 Fed. 731.

[56] United States v. Aakervik, 180 Fed. 137.

[57] United States v. Cantini, 199 Fed. 857.

[58] In re Talarico, 197 Fed. 1019.

[59] In re Ross, 188 Fed. 685.

[60] In re Trum, 199 Fed. 361.

26. **Duties of clerk.**—The clerk shall file a duplicate of each declaration of intention and send to the Bureau of Immigration and Naturalization, within thirty days after the issuance of a certificate of citizenship, a duplicate thereof, and keep on file a stub for each certificate, with a memorandum of all essential facts. He shall report to the bureau, within thirty days after the decision of the court, the name of every alien denied naturalization, and furnish the bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings relative to naturalization as may be required by the bureau; and a penalty is imposed for violation thereof. Clerks shall be responsible for blank certificates received from the bureau. Defaced certificates shall be returned to the bureau and not destroyed. For failure to comply, the clerk shall be liable in the sum of $50.[63] The declarations and petitions shall be bound in separate volumes and made part of the records of the courts; and each certificate of naturalization shall bear upon its face the volume number and page

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[61] Act of June 29, 1906, § 10, 34 U. S. Stats. at Large, p. 599.

[62] Act of June 29, 1906, § 11, 34, U. S. Stats. at Large, p. 599.

[63] Act of June 29, 1906, § 12, 34 U. S. Stats. at Large, p. 599.

number of the petition and of the stub of the certificate.[64]

27. **Fees.**—The fee for filing a declaration and issuing a duplicate is one dollar; for making, filing, and docketing the petition and for final hearing, two dollars, and for entering the final order and issuance of certificate, two dollars. The clerk may retain one-half of the fees and must pay over the other half at specified times to the Bureau of Immigration and Naturalization. He may retain one-half the fees in any fiscal year up to $3,000, and shall pay over the fees in excess to the bureau. The clerk shall pay all additional clerical force from fees received in naturalization proceedings. In case a clerk collects fees in excess of $6,000 in any fiscal year, the Secretary of Commerce and Labor may allow additional compensation for clerical assistance.[65] Penalties are imposed if a clerk or other officer wilfully neglects to render accounts of moneys or to pay over any balance due the United States, or receives any other fees than those specified above.[66]

28. **Forms of certificate of naturalization and of stub of certificate.**—The following are forms of certificate of naturalization and of stub of certificate:

Certificate of Naturalization.

Number ....
Petition, volume ......, page ....
Stub, volume ......, page ....
(Signature of holder) ....
Description of holder: Age, ...; height, ...;

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[64] Act of June 29, 1906, § 14, 34 U. S. Stats. at Large, p. 601.

[65] Act of June 29, 1906, § 13, 34 U. S. Stats. at Large, p. 600.

[66] Act of June 29, 1906, §§ 20, 21, 34 U. S. Stats. at Large, p. 602.

color, ...; complexion, ...; color of eyes, ...; color of hair, ...; visible distinguishing marks, ... Name, age, and place of residence of wife, ..., ..., ... Names, ages, and places of residence of minor children, ..., ..., ..., ..., ..., ..., ..., ..., ...

............., ss:

Be it remembered, that at a ...... term of the ..... court of ......, held at ...... on the ...... day of ......, in the year of our Lord nineteen hundred and ......, ..., who previous to his (her) naturalization was a citizen (or subject) of ......, at present residing at number .... street, ... city (town), ... State (Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in his State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that .... he was entitled to be so admitted, it was thereupon ordered by the said court that ...he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the ...... day of ......, in the year of our Lord nineteen hundred and ...... and of our independence the ....

[L. S.] ....,
(Official character of attestor.)

Stub of Certificate of Naturalization.

No. of certificate, ...
Name ....; age, ...
Declaration of intention, volume ....., page .....

Petition, volume ....., page .....
Name, age, and place of residence of wife, ...,
......, ... Names, ages, and places of residence of minor children, ..., ..., ..., ...,
......, ..., ..., ..., ..., ..., ...
....
....
Date of order, volume ......, page ......
(Signature of holder) ....[67]

29. **Fraudulent naturalization.**—United States district attorneys "upon affidavit showing good cause therefor" are directed to institute proceedings to cancel a certificate of citizenship for fraud, and the holder shall have due notice thereof. If a holder, within five years after the issuance of a certificate, takes permanent residence abroad, it shall be sufficient, in the absence of countervailing evidence, to authorize the cancellation of his certificate as fraudulent, and diplomatic and consular officers of the United States in foreign countries shall furnish the names of those within their jurisdictions who have such certificates and who have taken permanent residence abroad, and such statements, duly certified, shall be admissible in evidence. Upon canceling a certificate, the court shall send a certified copy of its order to the Bureau of Immigration and Naturalization. In case such certificate was not issued by the court making the order, the clerk shall transmit a copy to the court out of which the certificate originally issued. The above provisions shall apply not only to certificates issued under this act, but to those

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[67] Act of June 29, 1906, § 27, 34 U. S. Stats. at Large, p. 603.

issued heretofore.[68] Certain certificates have been validated by statute.[69]

30. **Criminal offenses.**—The following are criminal offenses: Forging certificates of citizenship, engraving counterfeit plates for citizenship certificates, false personation in procuring naturalization, using false certificate of citizenship and denying citizenship, attempting to vote on false certificate, falsely claiming citizenship, and falsely swearing in naturalization cases; and the above provisions are applicable to all courts of naturalization.[70] It is a felony for a clerk or other person illegally to issue certificates,[71] and punishment is imposed for falsely certifying appearances, acknowledgments and signatures,[72] and for fraudulently obtaining naturalization.[73] An indictment must be found or the information filed within five years next after the commission of the crime.[74] For the prosecution of all crimes against the naturalization laws committed before this act went into effect, the existing laws were to remain in force.[75]

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[68] Act of June 29, 1906, § 15, 34 U. S. Stats. at Large, p. 601.

[69] Act of June 29, 1906, 34 U. S. Stats. at Large, p. 630.

[70] Act of Mar. 4, 1909, §§ 74-81, 35 U. S. Stats. at Large, p. 1102.

[71] Act of June 29, 1906, § 18, 34 U. S. Stats. at Large, p. 602.

[72] Same, § 22, same, p. 603.

[73] Same, § 23, same, p. 603.

[74] Same, § 24, same, p. 603.

[75] Same, § 25, same, p. 603.

CHAPTER V.

NATURALIZATION BY RELATIONSHIP AND WITHOUT RESORT TO LEGAL PROCEEDINGS—MARRIAGE.

31. **The status as determined by statute of an alien woman married to an American.**—Formerly an alien woman, who married an American, still remained an alien, and cases likewise arose, in which it was held that American women, who married foreigners and lived with them in other countries, were not divested of their American citizenship. In 1855 a statute was passed which, with a few verbal changes, is now as follows: "Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."[76] There are decisions upon the clause, "who might herself be lawfully naturalized," but it seems to be established that it includes women who are white or of African nativity or descent; and, as to Indians, a statute provides that every Indian woman of any Indian tribe, except the Five Civilized Tribes in the Indian Territory, married to a citizen of the United States, becomes a citizen with the rights of any such citizen, being a married woman.[77] The word "married" does not refer to the time but to the state of marriage, and it makes no difference whether the ceremony was performed before the husband became a citizen or

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[76] U. S. Rev. Stats., § 1994.

[77] Act of August 9, 1888, § 2, 25 U. S. Stats. at Large, p. 392.

whether he became a citizen first and the marriage took place afterwards.[78]

32. **Same subject—Residence, nature of citizenship and termination thereof.**—The questions arise, "Where must the married woman reside?" "Is residence in the United States necessary in order to confer citizenship?" A few cases hold that an alien woman, who marries an American citizen, is herself a citizen, although she never resides within the United States. The better rule seems to be that the statute cannot be construed to naturalize an alien married woman, who has never been within the United States, and continues to reside within a foreign jurisdiction. As to the nature of citizenship, it seems to be complete. The alien married woman becomes a citizen without any declaration and irrespective of the period of her residence in this country, as fully as if she had become a citizen upon her own application and by the judgment of court. As to the termination of her citizenship, it is provided that "any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continues to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."[79]

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[78] Kelly v. Owen, 7 Wall. 496 (U. S.).

[79] Act of Mar. 2, 1907, § 4, 34 U. S. Stats. at Large, p. 1229.

33. **Status of an American woman married to a foreigner.**—This is the converse of the proposition that an alien woman married to an American becomes a citizen.

Many perplexing questions arose, and, after numerous decisions of the courts and rulings by the Executive Department of the government, the matter was determined by the following statute: "Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."[80] This law is similar to that now in force in most other civilized countries. A case of naturalization by special act of Congress of an American woman upon the death of her husband, a British subject, has already been referred to.[81]

34. **Naturalization of minor children by naturalization of parent.**—Children of persons duly naturalized, "being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."[82]

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[80] Act of Mar. 2, 1907, § 3, 34 U. S. Stats. at Large, p. 1228.

[81] See Chap. II, § 10.

[82] U. S. Rev. Stats., § 2172.

There was much doubt as to the meaning of the clause "dwelling in the United States," but it is now provided "that a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child: And provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."[83] The children must come within the jurisdiction of the United States, and naturalization must be complete. Declaration of intention of parent is not sufficient. It is to be noted that children born abroad of American parents are citizens of the United States, and that, if they continue to reside abroad, to receive the protection of the government, they must at eighteen record at an American consulate their intention and at twenty-one take the oath of allegiance to the United States.[84]

35. **Status of children by naturalization of mother by marriage.**—Where a resident alien woman marries an American citizen, the question arises as to the status of her minor children by the former marriage. As has been pointed out, any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.[85] It would seem, therefore, that the minor child

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[83] U. S. Rev. Stats., § 1993; Act of Mar. 2, 1907, § 5, U. S. Stats. at Large, p. 1229.

[84] Act. of Mar. 2, 1907, § 6, 34 U. S. Stats. at Large, p. 1229.

[85] U. S. Rev. Stats., § 1994.

or children by the first marriage become citizens of the United States in virtue of the statute cited above;[86] and it has been expressly held upon the marriage of a resident alien woman with a naturalized citizen, that she, as well as her infant son dwelling in this country, became citizens of the United States as fully as if they had become such by the special mode prescribed by the naturalization laws.[87]

36. **Application of law to illegitimate and adopted children.**—In many jurisdictions statutes provide that if the father of an illegitimate child marries the mother, and acknowledges the child as his own, the child is thus made legitimate. In such case, if the father should become naturalized, the child would become a citizen. But, in the case of an illegitimate child, not acknowledged by the husband of the mother, the rule would probably be otherwise. State laws of adoption are now general, and adopted children have all the rights of children born to parents, at least so far as domestic relations and questions of inheritance are concerned. But adoption does not confer citizenship upon an alien. Not only are the naturalization laws of the United States silent upon the subject but the Department of State has more than once held that "a child born abroad of foreign parents is not, by an act of adoption under a state law, brought within any of the provisions of the laws of the United States prescribing United States citizenship."[88]

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[86] U. S. Rev. Stats., § 2172.

[87] United States v. Kellar, 11 Biss. 314, 13 Fed. 82.

[88] Van Dyne, Naturalization, p. 223.

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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

WE THE PEOPLE* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECTION 1.

1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.

1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

2. No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

3. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The

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* In the original the clauses are not numbered, nor is there any title to the document. It begins, "WE THE PEOPLE." The punctuation and capitalization is that of the original.

actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the Representation from any State, the Executive authority thereof shall issue Writs of Election to fill such vacancies.

5. The House of Representatives shall chuse their Speaker and other officers; and shall have the sole power of Impeachment.

SECTION 3.

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature* thereof, for six Years; and each Senator shall have one Vote.

2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the expiration of the sixth year; so that one third may be chosen every second Year; and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*

3. No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

*See Amendment XVII.

5. The Senate shall chuse their other Officers, and also a President pro tempore in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States; but the Party convicted shall, nevertheless, be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4.

1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. *

2. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5.

1. Each house shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

3. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of

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* See Amendment XVII.

the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6.

1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House, during his Continuance in Office.

SECTION 7.

1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills.

2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names

of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment), shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8.

1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. To borrow Money on the credit of the United States;

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

4. To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

5. To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

6. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

7. To establish Post-Offices and post Roads;

8. To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

9. To constitute Tribunals inferior to the supreme Court;

10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

13. To provide and maintain a Navy;

14. To make Rules for the Government and Regulation of land and naval Forces;

15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

16. To provide for organizing, arming, and disciplining the Militia, and for Governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9.

1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

3. No Bill of Attainder, or ex post facto Law shall be passed.

4. No Capitation or other direct Tax shall be laid, unless in

Proportion to the Census or Enumeration herein before directed to be taken.*

5. No Tax or Duty shall be laid on Articles exported from any State.

6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties, in another.

7. No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10.

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any title of Nobility.

2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War, in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or Engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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*See Amendment XVI.

ARTICLE II.

SECTION 1.

1. The Executive Power shall be vested in a President of the United States of America. He shall hold his office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

3. *The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such a Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse, by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List, the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

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*See Amendment XII.

4. The Congress may determine the Time of chusing the Electors, and the day on which they shall give their Votes; which Day shall be the same throughout the United States.

5. No Person except a natural-born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be Increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period, any other Emolument from the United States, or any of them.

8. Before he enter on the Execution of his Office he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2.

1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the

Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers, and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of the next Session.

SECTION 3.

1. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall commission all the Officers of the United States.

SECTION 4.

1. The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1.

1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their

Services a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2.

1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.*

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3.

1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* See Amendment XI.

ARTICLE IV.

SECTION 1.

1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

SECTION 2.

1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

3. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3.

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4.

1. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each

of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

1. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE VI.

1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

1. The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth *In Witness* whereof We have hereunto subscribed our Names,

Go: WASHINGTON—*Presidt.*
and deputy from Virginia.

Attest William Jackson Secretary.

New Hampshire:
John Langdon
Nicholas Gilman
Massachusetts:
Nathaniel Gorham
Rufus King
Connecticut:
Wm: Saml. Johnson
Roger Sherman
New York:
Alexander Hamilton
New Jersey:
Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton
Pennsylvania:
B Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. Fitz Simons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware:
Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom
Maryland:
James McHenry
Dan of St. Thos. Janifer
Danl Carroll
Virginia:
John Blair—
James Madison Jr.
North Carolina:
Wm: Blount
Richd. Dobbs Spaight
Hu Williamson
South Carolina:
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler
Georgia:
William Few
Abr Baldwin

[*Articles in Addition to and Amendment of the Constitution of the United States of America, Proposed by Congress and Ratified by the Legislatures of the several States, Pursuant to the Fifth Article of the Constitution.*]

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III.

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor, in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

SECTION 1.

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2.

The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII.

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies, provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

QUIZ QUESTIONS
CONSTITUTIONAL LAW

PART I

DEFINITIONS AND GENERAL PRINCIPLES

(*The numbers refer to the numbered sections in the text.*)

1. Define constitutional law and show how it is related: (a) to administrative law; (b) to international law; (c) to statute law.
2. What are some matters that are usually dealt with by constitutional law? Should the matter of suffrage and elections be regulated by constitutional law or statute law? Appointments to office? Removals from office?
3. Give the origin of the term "constitution." When was it first employed in America? What was the first example of a written constitution in America? What is the oldest existing constitution in this country?
4. Define a constitution in the modern sense of the term. What are the tests for distinguishing between a constitution and a statute: (a) in America? (b) in England?
5. Show how it is necessary that every state should have a constitution. What is meant when it is said that a constitution should be a "vehicle of life"?
6. Distinguish between the formal constitution and the actual working constitution. Is all the Constitution of the United States to be found in the written text?
7. What are some of the different forms of constitutions? Distinguish between evolved and enacted constitutions. Give examples.
8. Distinguish between written and unwritten constitutions. Give examples of each. Is a written constitution necessarily

rigid? How might the Constitution of the United States be made flexible?

9. What are some of the methods by which written constitutions are framed? Give examples.
10. Describe the character of the British constitution. What is Dicey's distinction between the "law" and the "conventions" of the constitution? Give examples of written and unwritten elements in the British constitution. May an English statute ever be unconstitutional? If so, in what sense? What is the meaning of the term "unconstitutional" in England? In America? Would an act of Parliament making a man a judge in his own case be a constitutional statute?
11. Is the distinction between a written and an unwritten constitution a logical and a precise distinction? Show how written constitutions acquire an unwritten element. Is there any existing constitution which is entirely written? Give examples of unwritten elements in the Constitution of the United States.
12. Mention some of the advantages of a written constitution. Some of the elements of weakness. Some of the advantages of an unwritten constitution. Some of the disadvantages.
13. What are the essential parts of a constitution? Give an outline of a typical state constitution.
14. What is a bill of rights? What are some of the declarations usually contained in it? Has the Federal Constitution a bill of rights? Is the bill of rights a prohibition on the legislature or the executive, or both?
15. Compare the federal and state constitutions from the standpoint of their length and content. How do you account for the tendency of the state constitution to grow in length? Give examples of provisions in your state constitution which logically should be in the statutes.
16. Are the states subject to any federal restrictions in establishing their constitutions? Narrate the circumstances under which the first state constitutions were framed?
17. Describe the character of the original state constitutions. Through what stages of development have the state constitutions passed since the Revolution?
18. Explain the provision by which the early state constitutions

were framed and put into force. Were they framed by constitutional conventions or state legislatures? What are the usual methods by which state constitutions are framed and put into force today? Must the constitution be approved by the people before being put into operation? Where the constitution contains no provisions for the calling of a convention, has the legislature any power to call a convention?

19. Is a constitutional convention bound by the restrictions contained in the legislative act by which it is called? May it legislate and appropriate money? Is it bound by the provisions of the existing constitution under which it sits? While in session may it supersede the existing organs of the state government?
20. What were some of the defects of the Articles of Confederation? How did the Congress of the Confederation enforce its acts? If an individual robbed the mails or assaulted a foreign minister, by what authority was he punished? Why was the government of the Confederation unable to enforce its treaties with foreign countries?
21. Trace the steps by which the Federal Constitution was framed and ratified. Was the procedure followed according to strictly legal methods?
22. What was the nature of the powers of the delegates to the Constitutional Convention of 1787, as they were set forth in their credentials? What were some of the compromises of the Constitution?
23. What were some of the objections raised against the Constitution at the time of its ratification? Might a state have ratified upon condition? Might it have withdrawn its ratification after having given it? Why was the Constitution not submitted to the people?
24. What were some of the principal differences between the Articles of Confederation and the Constitution? Name some important powers conferred by the Constitution on Congress which under the Articles of Confederation remained with the states.
25. What was Hamilton's argument in reply to the contention that the Federal Constitution was incomplete without a bill of rights? What are some of the provisions of the so-called

federal Bill of Rights? Are its provisions prohibitions on the states as well as upon the United States? Are they prohibitions upon the executive as well as upon Congress?

26. What are the principal sources of the Federal Constitution? Point out some of its original features. Some of its derived features.
27. By what processes does a written constitution develop and expand? Show how the Constitution of the United States has been modified by custom; by judicial interpretation; by action of the political parties.
28. Describe the procedure by which the Federal Constitution may be amended. When a state legislature has once ratified a proposed amendment may it subsequently withdraw its ratification? May the President veto a resolution proposing an amendment to the Constitution? Discuss the purposes and provisions of the various amendments that have been adopted.
29. Describe the three general modes of procedure for amending state constitutions. What are the methods prescribed in Delaware and New Hampshire? What is meant by the dual system of amendment?
30. Describe the Oregon method of amending its constitution.
31. When the constitution provides for a specific method of amendment may a different mode be followed? Is the rule of liberal or strict construction followed by the courts in the interpretation of constitutional provisions regarding amendments?
33. What are some of the rules generally observed by the courts for the construction of state constitutions? What is meant by the doctrine of *stare decisis?* Distinguish between mandatory and directory provisions of a constitution. Where the governor of a state is authorized to summon the legislature in extra session and to call out the militia, may the courts control his action?
34. What is meant by the supremacy of the Federal Constitution laws and treaties? Does it mean that any act which Congress may choose to pass necessarily supersedes all state legislatures concerning the matter with which it deals, when such legislation has been rightfully enacted?
35. What is the attitude of the courts in Europe toward uncon-

stitutional legislation? What authority is the judge of the validity of legislative acts generally in Europe? Have the European courts power to declare the acts of subordinate legislative bodies unconstitutional?

36. Give some examples of early American cases in which the courts asserted their right to declare legislative acts unconstitutional. What were the arguments of Hamilton in support of the right of the courts to refuse to be bound by unconstitutional statutes? What was the early attitude of public opinion toward the exercise of this power?
37. What was the main question involved in the case of Marbury v. Madison? Summarize the opinion of Chief Justice Marshall. Give some examples of important cases in which acts of Congress have been declared unconstitutional.
38. Does not the power of the courts to declare statutes null and void in effect give to the judiciary a veto upon acts of the legislature? If so, how may the power be defended? Does it not give the courts a certain share in the determination of public policies?
39. What are some of the rules observed by the courts in declaring statutes unconstitutional? They refuse to pass upon "political" questions. What is a "political" question as distinguished from a judicial question?
40. What are some of the extrinsic aids which the courts make use of in their efforts to discover the meaning of the Constitution? How far are they justified in resorting to the debates in the Constitutional Convention?
41. What is the effect upon a statute of holding it unconstitutional? What becomes of rights acquired under the statute? Does the statute afford any defense to an officer who has acted in pursuance of it?
42. What are advisory opinions? What importance may be attached to them? In what states may the governor or the legislature, or both, call upon the Supreme Court for such opinions? Will the Supreme Court of the United States give advisory opinions to the President?

QUIZ QUESTIONS
CONSTITUTIONAL LAW

PART II

ORGANIZATION AND POWERS OF THE UNITED STATES GOVERNMENT

(*The numbers refer to the numbered sections in the text.*)

1. What is federal government? How is it distinguished from unitary government? From confederate government? What are some of the elements of strength in the federal system? Some of the elements of weakness?
2. What is the principle upon which the powers of government are distributed between the United States and the states? In your opinion, should the authority of the United States government be extended to include such matters as the regulation of insurance, negotiable instruments, bills of exchange, and marriage and divorce? What is the purpose of the state commissions on uniform laws? To what extent have they succeeded in securing the adoption by the states of uniform legislation?
3. Distinguish between exclusive and concurrent powers. Illustrate. Under what circumstances may the states legislate in respect to bankruptcy and interstate commerce?
4. Mention some powers expressly prohibited to Congress. Some prohibited by implication. Is the presumption in favor of any power claimed by Congress or against it? Why?
5. What is meant by reserved powers? Mention some of the powers of government which fall within the domain of the states. Is there any document or court decision where one may find an enumeration of the powers of the states?

6. Mention some powers of government expressly prohibited to the states. Some prohibited by implication to the states. Is the presumption in favor of any power claimed by a state or against it? Give the reason for your answer.
7. What is meant by implied powers? Give examples.
8. What is meant by "resulting" powers? Give examples.
9. What do you understand by "inherent" powers?
10. In what sense is the federal authority supreme over that of the states? May the state governments interfere in any way with the officers, instrumentalities or processes of the United States? May the state courts take jurisdiction of a federal officer who commits a crime in the discharge of his duties? May the states make criminal an act committed by a federal officer when it has not been made a crime by federal statute?
11. In what respect may the general government control the form of the state governments? What is a republican form of government? Are life tenures for public office consistent with republican government? Property qualifications for voting and holding office? The initiative and referendum for purposes of general legislation? What department of the United States government is charged with guaranteeing a republican form of government to the states?
12. What are some of the constitutional rights and privileges of the states? What remedy has a state in case it is denied the rights and privileges secured to it by the Constitution?
13. Discuss the purpose and meaning of the full faith and credit clause. Under what circumstances are the courts of one state bound to recognize the validity of a marriage celebrated in another state? The validity of a divorce? Are the courts of one state bound to take notice and enforce the criminal judgments of other states?
14. What is the nature of the obligation imposed on the government of the state in regard to the surrender of fugitives from justice? Will the courts compel the executive by mandamus to surrender a fugitive for whom demand has been made by the executive of another state? What sort of evidence of guilt is required before the executive will surrender a criminal? Suppose the offense with which the fugitive is charged is not a crime according to the law of

the state in which he has taken refuge? In such cases is it the law of the demanding state or the law of the state upon which the demand is made that should determine the obligation of the governor to make the surrender?

15. What are some of the rights and privileges of state citizenship? Is it a right of a citizen of one state to go into another state and demand the enjoyment of the same privileges that he enjoyed in the state from which he came, even though they are not accorded to citizens of the state in which he takes up his residence?
16. May a state be coerced into the performance of its constitutional duties? If so, how? Were the states coerced by President Lincoln into remaining in the Union?
17. Why should the legislative, executive and judicial functions be entrusted to separate and distinct departments? What are some of the exceptions to the principle of the separation of powers in the organization of the government of the United States? Is the granting of divorces a legislative or judicial function? Would an act of Congress declaratory of the meaning of an existing statute be a violation of the principle?
18. Classify the constitutional powers of the President. What are the sources of his power? May Congress impose upon him duties not authorized by the Constitution?
19. Describe the power of the President in respect to the appointment of public officers. When a commission has been made out for an appointment and signed by the President, has the appointee a legal right to the commission? May Congress limit or regulate the appointing power of the President. What provision does the Constitution contain in respect to the removal of officers? Where the President appoints an officer and gives him a commission which states that he shall hold the office for four years, may he be removed before the expiration of this period?
20. To what extent may the President direct an officer in the performance of his duties? May he direct an officer to do what the Constitution and laws forbid? In that case, might the officer plead as a bar to prosecution that he had acted under the orders of the President?
21. How does the organization of the executive power of the

United States differ from that of the states? Are the cabinet officers colleagues or subordinates of the President? Is the act of a cabinet officer the act of the President? May he correct the act of a cabinet officer?

22. Describe the power of the President in respect to the conduct of foreign relations. To what extent may the President conclude international agreements without the consent of the Senate? Give examples? To what extent does the House of Representatives participate in the making and enforcement of treaties? Is a treaty paramount to an act of Congress? May an act of Congress modify or abrogate a treaty? What are the limitations on the treaty-making power?

23. To what extent does the President share in the exercise of the legislative power? Describe the veto power? To what extent may the President legislate by means of executive orders? Is his action subject to the control of the courts when he exercises the ordinance power?

24. What are the military powers of the President? Under what circumstances may he call out the militia? May he send the militia out of the country? Is his judgment in respect to the necessity of calling out the militia reviewable by the courts? Under what conditions may he suppress domestic violence in a state?

25. What is the extent of the pardoning power of the President? Are there any constitutional limitations upon his power to grant pardons? Distinguish between pardon and amnesty. Might Congress regulate the exercise by him of the pardoning power? Might it abridge his power to grant amnesty?

26. What remedies has the individual against the illegal action of the President? May the courts control in any way his acts? Will they issue a mandamus against him to compel him to perform a constitutional duty? Will they restrain him by injunction from doing an illegal act?

27. To what extent has the United States government the power of taxation? What are the limitations on its taxing power? What is the provision of the Sixteenth Amendment in regard to the power of Congress to levy taxes? Give examples of the exercise by Congress of the taxing power (1) to regulate, (2) to destroy.

28. Are there any constitutional limitations on the power of Congress to borrow money? What has been the attitude of the Supreme Court on the question of the right of Congress to give the legal tender quality to paper currency? What is the doctrine of Juilliard v. Greenman in regard to the extent of this power?
29. What has the commerce power of Congress been interpreted to include? Give some examples of important legislation which has been enacted in pursuance of this power. To what extent is the power of Congress to regulate commerce exclusive? To what extent may the states regulate commerce?
30. Is the power of Congress to enact laws on the subject of naturalization exclusive? What persons are excluded from the benefits of the naturalization laws?
31. Under what circumstances may the states legislate on the subject of bankruptcy? What are the principal provisions of the existing federal bankruptcy act?
32. Is the power of Congress to coin money an exclusive one? The power to punish counterfeiting?
33. Why has Congress never exercised its power to fix a standard of weights and measures? Is this an exclusive power of Congress?
34. What has the power of Congress to establish post offices and post roads been interpreted to include? May the states operate a postal service in competition with that of the United States government? May letters or packets containing newspapers or pamphlets be dispatched by private express? May Congress, in pursuance of its power to prescribe what matter may be transported by mail, exclude from the mails lottery tickets or obscene literature?
35. Since copyrights and patents are monopolies, how may they be justified? What remedy has the holder of a copyright or patent in case his rights are infringed? Under what conditions may a foreign author obtain a copyright in the United States?
36. What is the extent of the criminal jurisdiction of the United States government? Name some crimes that may be punished only by the United States; some that may be punished both by the United States and the states.

37. What powers does the Constitution confer on Congress in respect to war? May war exist in the absence of a declaration by Congress? In whom does the Constitution vest the power to suspend the writ of habeas corpus, the President or Congress?
38. Distinguish between military government and martial law. Between a court martial, a military commission and a civil court. What are the rights of a military occupant in the territory occupied by him? Is the private law of an occupied territory displaced by that of the occupant upon taking possession of the same?
39. What is the nature of the powers of Congress in respect to the government of the territories? How does it differ from the power of Congress in respect to legislation for that part of the country which is under state organization? Might Congress enact a law of libel and slander applicable within the states? Does the Constitution extend *ex proprio vigore* to newly acquired territory? What is the distinction between "incorporated" and "unincorporated" territories? Between "organized" and "unorganized" territories?
40. What is the nature of the power of Congress over the District of Columbia? Does the purchase by Congress of land within a state for building sites, military reservations and the like give the United States political jurisdiction over such land?
41. What are the provisions of the Constitution in regard to the admission of new states to the Union? Was the admission of West Virginia in accordance with these provisions? What have been the two modes of procedure followed for the admission of new states? May Congress prescribe conditions under which a new state may be admitted when the effect of such conditions is to establish an inequality between the new state and the original states?

QUIZ QUESTIONS CONSTITUTIONAL LAW

PART III

CONSTITUTIONAL GUARANTIES OF FUNDAMENTAL RIGHTS

(*The numbers refer to the numbered sections in the text.*)

1. What types of organic instruments were well known to the American colonists?
2. Give names and dates of important English constitutional documents.
3. Describe Magna Charta.
4. Describe a bill of rights in a state constitution.

5-6. Is there anything in the Federal Constitution prohibiting a state from abolishing trial by jury? Discuss fully.

7. What substantial guaranties are provided by amendments to the Federal Constitution against infringement of individual rights by the state?

8-10. (a) What are some of the privileges and immunities of federal citizenship? (b) If a state statute should deny the privilege of fishing in the public waters of the state to aliens, would any guaranty of the Federal Constitution be violated?

11. May Congress provide for judicial procedure in the Philippines so as to deny the common law right to trial by jury?

12-18. (a) How is the right of citizenship in a state to be determined? (b) Discuss the question of citizenship of the children of alien residents.

19. Discuss the citizenship of members of Indian tribes.

20-30. (a) What is meant by expatriation? (b) Describe the most important steps in the process of naturalization. (c) Would a member of a Canadian Indian tribe, coming into the United States for permanent residence, be entitled to naturalization? Give reasons for answer. (d) Can a member of an Indian tribe having a reservation within the United States become a citizen?

31-33. (a) Is the right of suffrage necessarily incident to citizenship? (b) Is the right to vote for a member of Congress a privilege or immunity of federal citizenship? Explain fully.

34-40. What is the guaranty as to republican form of government in a state and how may it be enforced?

41. Name some of the important constitutional guaranties of civil rights.

42-45. Explain the nature of religious liberty.

46-49. Would a state statute be unconstitutional which should prohibit discussion of socialism as a substitute for representative government?

50. Would it be constitutional to prohibit assemblages of women to discuss the question of woman's suffrage and petition for the submission of a constitutional amendment granting such suffrage?

51-52. May a city council prohibit the drilling of voluntary military organizations in the city streets?

53-54. Describe the essential characteristics of a valid search warrant.

55-58. (a) Is the involuntary confinement of an insane person an infringement of personal liberty, in a constitutional sense? (b) Discuss the nature and validity of federal statutes prohibiting peonage.

59-63. (a) What constitutional guaranties are there as to due process of law; and what is the meaning of that term? (b) In what sense are all persons equal before the law?

64-67. What are the characteristics of jury trial in civil cases; and to what extent is that method of trial guaranteed by constitutional provisions?

68-69. What are the essentials of due process of law in criminal cases?

70-71. What is an ex post facto law and what are the constitutional guaranties with reference thereto?

72-77. Can indictment as a method of accusation for crime be superseded for the state or federal courts by the substitution of some other method of accusation? Discuss fully.

78-81. (a) Discuss the right of jury trial in criminal cases. (b) Would any constitutional guaranty be violated by a statute requiring the defendant in a criminal case to testify as a witness?

82-84. What constitutional objection if any would there be to a statute providing that after the defendant in a criminal case had been acquitted, a new trial might be granted on showing that new evidence of his guilt had been discovered?

85-86. Would a statute of Congress be constitutional which should prohibit the exclusion of colored persons from restaurants?

87-89. Does the guaranty of due process of law prevent the substitution of other methods of procedure for those recognized at the common law? Give illustrations.

90-91. Would a state statute prohibiting Chinese from maintaining and operating restaurants in wooden buildings be constitutional? Give reasons.

92. Does the guaranty of due process of law constitute a limitation on legislative power?

93-110. (a) Describe in a general way the meaning and scope of the so-called police power. (b) Discuss the validity of a state statute which should prohibit the sale of cold-storage eggs after they should have thus been kept in store for more than three months. (c) Discuss the validity of a state statute prohibiting the practice of medicine by persons who have not received a state license to practice. (d) Would a state statute be constitutional which should prohibit the employment of any person at farm labor for more than eight hours per day? (e) Would a state statute be constitutional which should prohibit owners of wooden buildings from leasing them to Chinese for carrying on laundries? (f) Would a state statute be valid which should make it a crime to drink intoxicating liquors? (g) Discuss the validity of a federal statute which should prohibit the sale of intoxicating liquors within any state. (h)

Would a federal statute be valid requiring railroads to transport members of Congress without charge?

111-112. (a) Is judicial procedure essential in the levying and collection of taxes? (b) Can a civil court in proceedings by habeas corpus inquire into the validity of imprisonment in pursuance of the order of a military tribunal?

113. Explain the distinction between jurisdiction in rem and jurisdiction in personam.

115-116. (a) Explain what is meant by the term vested rights. (b) To what extent may retrospective legislation be sustained as constitutional?

117-119. If a state statute should authorize the issuance of warrants for the salaries of officers with the provision that such warrants should be receivable in payment of taxes, would a subsequent statute be valid which prohibited the acceptance of warrants already issued in payment of such taxes?

120-121. (a) Explain the principle announced in the Dartmouth College case. (b) Would a state statute prohibiting the sale of intoxicating liquors be valid as applied to a corporation previously chartered to carry on the business of manufacturing intoxicating liquors?

122-127. (a) Would a state statute prohibiting the sale of intoxicating liquors be valid as applied to a previous contract for the sale of such liquors which was valid at the time it was entered into by the parties? (b) Would a state statute be valid which, applied to existing contracts, should exempt the homestead of the debtor from sale on execution, no such exemption having been authorized by law at the time the contract was made? (c) Discuss the validity of a federal bankrupt law as applied to debts already contracted prior to the enactment of the law.

QUIZ QUESTIONS
CONSTITUTIONAL LAW
PART IV
EMINENT DOMAIN

(*The numbers refer to the numbered sections in the text.*)

1. What are the two principal constitutional provisions affecting the power of eminent domain?
2. Could the United States take the capitol building of a state for a post office without the consent of the state?
3. (a) The United States takes land for fortifications. A strip of land not taken lies between the fortifications and the sea, and the heavy guns are necessarily continually discharged over this land, so that it cannot be built upon. Is the owner constitutionally entitled to compensation? (b) Is the owner of adjacent land depreciated in value by reason of the noise of the firing constitutionally entitled to compensation?
4. The city authorities find it necessary to cut down a handsome shade tree standing in a highway to permit the passage of motor trucks. Has the abutting owner any remedy?
5. A street is laid out by the public authorities and the grade established, and a man builds a brick house fronting on the street at the established grade. The city then lowers the grade of the street ten feet and the owner is put to great expense to keep his house from collapsing? Has he any remedy?
6. Why is a steam railroad an additional servitude upon a public highway?
7. An abutting owner maintains a vault under the sidewalk of a public street for over twenty years. A subway for street cars is then constructed, occupying the whole of the space under the street and depriving him of his vault. Has he any remedy?
8. Is an underground pneumatic tube for transmitting mail matter an additional servitude upon a public highway?

9. In a sparsely settled country town a few wealthy summer residents subscribe a fund for lighting the roads, and the town undertakes the work. In erecting electric light poles and wires in a road, fruit trees of a farmer overhanging the road are necessarily damaged. Has he any remedy?
10. An elevated railroad is constructed in a street the fee of which is in the city. Has the owner of abutting land any remedy?
11. A city takes land for park purposes. Subsequently some of the trees are cut down. Who owns the wood?
12. A highway is laid out 80 feet wide, but only 20 feet is wrought for travel. A land owner applies for and receives compensation under a statute providing for the payment of all damages; but no claim is made for damage from surface water. Ten years later the highway is wrought to its full width and surface water flows upon the owner's land. Has he any remedy?
13. A parcel of land fronts upon the principal street in a town. In abolishing a grade crossing the street is discontinued just beyond the parcel in question, leaving the parcel fronting upon a dead end and depreciating it in value one-half. Has the owner any remedy?
14. The legislature authorizes the diversion of part of the waters of a public watercourse to furnish a water supply to a city several miles away. Have the riparian owners any remedy?
15. A parcel of land is subject to a restriction in favor of an adjoining parcel that no building over one story in height shall be erected thereon. The first parcel is taken for a courthouse and a building five stories in height is erected thereon. Has the owner of the other parcel any remedy?
16. A parcel of land which is held by a tenant under a lease is taken by eminent domain. It is fitted up as a store, the fixtures having been put in by the tenant. He removes them but they are of little value elsewhere. Has he any remedy for the damage to his fixtures?
17. A agrees on July 1 to buy a parcel of land of B on October 1 for $2,000. September 1 the city takes the land for a schoolhouse and awards $2,500 as compensation. Is A entitled to any of the money?
18. A corporation is granted a franchise to erect and maintain a

toll bridge across a certain river. Subsequently the legislature authorizes the erection of a free bridge across the same river 100 yards above it. Has the corporation any remedy?

19. A city acquires land for a park by eminent domain. The legislature subsequently provides that a schoolhouse shall be erected on the park. Have the taxpayers of the city any remedy?
20. (a) A corporation is authorized to lay and maintain gas pipes in a street. Subsequently a subway is authorized to be built in the street and the gas pipes have to be moved. Has the corporation any remedy? (b) Would it make any difference if the pipes had been lawfully laid in private land?
21. The legislature of a state authorizes a taking for a certain use, and the highest court of the state sustains the statute, but the Supreme Court of the United States, on writ of error brought by A, reverses the decision. In the meantime a second state has enacted precisely the same statute and B contends that it is unconstitutional. Is he necessarily right?
22. A member of the legislature opposes the enactment of a statute authorizing a taking of land for a certain purpose on the ground that the use is not public. The statute is nevertheless enacted. The objecting member becomes a judge of the supreme court of the state. Can he consistently vote to sustain the statute?
23. A city desires to erect a small schoolhouse. There are plenty of available lots for sale at reasonable prices. Can the city take a lot by eminent domain?
24. A railroad company desires to establish a ticket office in a certain office building, but the owner of the building refuses to rent it. Can the railroad take the office by eminent domain?
25. Can the state of Pennsylvania constitutionally take possession of all the coal mines in the state and operate them itself?
26. Can a bathing beach be taken by eminent domain and devoted to public use in connection with a system of parks?
27. Would a statute requiring large private estates which were leased to tenant farmers to be cut up and sold to the tenants

be constitutional, if the legislature considered tenant farming a hindrance to the prosperity of the community?

28. In a state wholly dependent upon mining, the legislature reasonably supposes that the miners must be given the power of eminent domain if the mines are to be successfully worked. Is there any reason why eminent domain cannot be invoked for that purpose?
29. Under what theory were the mill acts held constitutional in Massachusetts?
30. Under what circumstances can eminent domain be employed in behalf of irrigation?
31. A growing city takes a water supply in excess of its present needs, but takes no more than it is likely to require in the future. The city thus deprives A, a manufacturer, of water he requires in his business, and it sells the surplus to B, a business rival of A. Has A any remedy?
32. A statute authorized a railroad corporation to take land by eminent domain, and provided that the land should be paid for out of the profits of the railroad. Is it constitutional?
33. A block of ten houses is built, and A purchases three of them, adjoining each other, numbered 4, 6 and 8, and lets them to separate tenants. A railroad is run through the block, taking all of No. 6 and part of No. 8. Is A entitled to damages for injury to his remaining land?
34. What are special benefits?
35. In a proceeding to take land for public use, has the owner of the land any right to be heard on the question whether other land is not more desirable for the purpose for which the taking is made?
36. A statute provides that damages for the taking of land by a city for a public way shall be determined by commissioners appointed by the mayor of the city. Is it constitutional?
37. A statute provides that applications for damages shall be filed within one year of the taking. Land belonging to a sea captain is taken while he is on a long voyage, and the year expires before he learns of the taking. Has he any redress?
38. A water company is authorized to supply a city and four suburbs, and is doing a profitable business. A subsequent legislature charters a new corporation to supply the same

city and five suburbs and authorizes it to take the franchise and property of the old corporation. Is the statute constitutional?

39. A city in putting a watercourse into a covered pipe, under a statute providing for the payment of damages, began at the upper end and completed about half the work when winter began and the work was stopped. In the usual spring freshets the water flowed down the pipe more rapidly than before, overflowed the banks below the end of the pipe, and inflicted serious damage on adjoining land. What remedy should the owner of such land pursue?
40. When a parcel of land is taken by eminent domain, is the fact that the land is connected with a railroad by a spur track to be considered as an element of value, if the railroad company may lawfully remove the track whenever it sees fit?
41. The easement to lay a tunnel for railway purposes below the surface of the ground is taken. Can the owner of a parcel of land under which the tunnel is laid recover damages for the anticipated rumbling noise of the cars?
42. A tract of vacant land is taken for a schoolhouse by eminent domain under a statute providing that the city shall pay all damages caused by the taking. Is the owner of land across the street and directly opposite the schoolhouse entitled to recover if he can show that his property was depreciated in value by loss of light and air on account of the erection of the schoolhouse and by the noise of the school children?
43. A private-owned lake is taken by a city for a water supply. Is an expert in the value of water supplies a competent witness as to value, if he is unfamiliar with this locality?
44. A city takes a piece of land by eminent domain and at the trial offers evidence that it is worth no more than $5,000. Can the owner put in evidence that the city authorities assessed it for purposes of taxation on a value of $10,000 one month before the taking?

QUIZ QUESTIONS

CONSTITUTIONAL LAW

PART V

TAXATION

(*The numbers refer to the numbered sections in the text.*)

1. The constitution of a state contains no reference to taxation. Can that state constitutionally levy a tax?
2. A city supplies all householders with water at a rate fixed by city ordinance. Is the water rate a tax?
3. In a certain state the fee for liquor licenses is doubled, although it is known that less than half as many licenses will be applied for. Is this an exercise of the power of taxation?
4. A general eight-hour law is held unconstitutional. The legislature then imposes a tax of 25 per cent of the gross receipts of all employers working their men more than eight hours a day. Is this constitutional?
5. What are the two divisions of the power of taxation?
6. What is the distinction between a general tax and a special assessment?
7. A statute provides that the cost of a new high school in a city shall be borne by the school district in which it is located. Is this a special assessment?
8. A corporation by its charter was exempted from taxes. Can it be obliged to pay a special assessment?
9. The owner of every automobile operating within a certain state is required to pay five dollars to the state. Is this a tax or an excise?
10. What are the two classes of excises?
11. What are the principal excises in the state in which you live?
12. In a certain state municipal bonds are exempt from taxa-

tion. A invests all his money in municipal bonds and dies. Is his estate subject to the inheritance tax?

13. Why was it necessary to amend the Constitution of the United States to make possible a federal income tax?
14. Why are direct taxes rarely levied by the United States except in time of war?
15. (a) Can the United States levy an excise upon the franchises of private corporations deriving their charters from the several states? (b) Of municipal corporations?
16. Can the United States levy an excise upon the production of goods in factories within the several states in which children under the age of twelve are employed?
17. (a) A town grows up around a lighthouse, and the United States acquires by eminent domain the right to prevent the erection of buildings over fifteen feet in height in front of the lighthouse. Is land subject to this restriction taxable by the state? (b) If so, to what extent?
18. A contractor derives his whole income from dredging operations for the United States. Can a state tax him on his income?
19. Can a state tax a transcontinental railroad chartered by Congress at a certain rate per ton of freight carried?
20. A state statute imposes an excise on sales by auction. A imports goods and sells them to B, who sells them at auction in the original package. Is the sale by B subject to the excise?
21. Can a state tax in proportion to their capacity vessels which navigate a lake lying wholly within the state and having no navigable outlet to the sea?
22. If Congress has not regulated the subject, could the state of New York make a tax on telephone messages applicable to calls to places in adjoining states?
23. A corporation is organized in state A for the purpose of establishing five-cent stores in all the principal cities of the country. State B imposes an excise of ten per cent of the capital stock of foreign corporations maintaining stores in the state. Can the corporation do business in B without paying the tax?
24. A railroad company's total capital stock is worth $2,000,000.

It owns a terminal worth $1,000,000 and 2 miles of track in state A and has 98 miles of track in state B. State B attempts to value the property of the corporation within the state for taxation as 98 per cent of the total value of its capital stock. Can this be constitutionally done?

25. A man goes through Michigan taking orders for shoes to be shipped from Massachusetts. Can Michigan require him to pay a license fee?
26. A carload of shoes being sent from Massachusetts to Michigan is detained one month in a town in New York on account of a railroad strike and is there during the tax day. Can it be taxed in New York?
27. A state statute provides that cotton goods manufactured within the state shall be exempt from taxation. Is this constitutional?
28. A corporation was chartered in 1875 to maintain a ferry, but, it being about to dissolve on account of lack of profits, in 1885 the legislature enacted that its property should forever be exempt from taxation. By 1910 the corporation was very prosperous. Can its exemption be revoked?
29. By the constitution of a state educational institutions are exempt from taxation. In reliance on this provision a college erects valuable buildings in the state. The constitution is then amended and the college taxed. Can this be done?
30. By the constitution of a state taxation must be proportional. The legislature enacts that if a certain corporation erects and maintains a factory within the state it shall be exempt from taxation for ten years. The factory is erected and at the end of two years the legislature repeals the exemption. Can this be done?
31. What remedy has a creditor of a municipality if the legislature repeals the laws under which it may levy taxes?
32. The supreme court of a state decides that a town can raise money by taxation to aid a railroad. A town issues bonds and donates them to a railroad, and the railroad sells them. The supreme court then reverses its previous decision and holds that the town cannot raise money to pay the bonds. Has a bondholder any remedy?

33. A state statute imposes a tax on all dividends of domestic corporations payable to non-residents. Is this constitutional?
34. A state statute provides that foreign corporations shall pay a tax on their property within the state at twice the rate imposed upon domestic corporations. Is this constitutional?
35. In an absolute monarchy the king grants to a friend the right to one-tenth of the proceeds of the mines of a certain colony. Is this a tax?
36. Can the legislature of a state constitutionally grant the public funds to aid a railroad?
37. Can the legislature of a state constitutionally grant the public funds to aid in the establishment of a factory, if it can be fairly said that the establishment of the factory will enhance the prosperity of the state?
38. Can the legislature of a state authorize a town to pension civil employees?
39. Can the legislature of a state require a town to pay the entire cost of a bridge connecting the town in question and another town in the same state?
40. What constitutional provision prohibits a state from taxing property not within its jurisdiction?
41. Describe the unit system of taxing the property of a corporation doing business in several states.
42. Where should a ship be taxed?
43. A corporation organized in state A issues bonds secured by mortgage on land in state B. The corporation's principal place of business is in state C. One of the bonds is owned by a resident of state D. In what state is it taxable?
44. Is there anything in the Fourteenth Amendment which would prevent a state from imposing an excise upon moving picture shows not applicable to other entertainments?
45. A state constitution requires proportionate taxation. About three-fifths of the inhabitants are farmers. A statute exempts each person from taxation on one ox. Is it constitutional?
46. Would the answer to question 45 be the same if substantially all the inhabitants were farmers and the statute had been in force since the constitution was adopted?

47. Can the legislature constitutionally impose an excise on the sale of provisions at retail?
48. A statute provides that a person assessed may appeal to the court sitting without a jury for an abatement. Is it constitutional?
49. A statute provides that a person who fails to bring in a list of his taxable property shall not have an abatement. A man honestly believes that he has no taxable property and brings in no list, but in fact he has taxable property. Is he precluded from an abatement?
50. Property of a non-resident is sold for non-payment of taxes, the only notice being publication in a local newspaper. He does not learn of the sale until it is too late to redeem. Has he any remedy?
51. Of what does an assessment of taxes consist?
52. A statute provides that the tax list shall be open to public inspection for five days before it is committed to the collector. This statute is not complied with, but no one calls at the assessors' office to examine the list. Is the tax invalid?
53. At a town meeting in March heavy appropriations are voted, and one of the inhabitants leaves the town permanently the next day. Taxes are assessed as of the first day of May. Is he liable for his share of the tax?
54. A appears of record to be the owner of certain land, but B holds an unrecorded deed from A, which is known to the assessors. To whom should the land be assessed?
55. The tax day is May 1. A man leaves town A on April 15, intending to make town B his home, but before going to B he visits his parents in town C and is there May 1. Where is he taxable?
56. (a) When a man was moving his goods from town A to town B he told the teamster he was never coming back. Could he call the teamster to testify as to this statement in a suit against A? (b) Could town B call him if it assessed the man and he claimed he was still a resident of A?
57. A man lives in town A and has a store in town B. In what town is his stock-in-trade assessed?
58. What is the next step after the assessment?

59. Is a tax a debt?
60. (a) A owned a horse on the tax day and subsequently sold it to B. Can the horse be distrained for non-payment of a tax assessed to A? (b) Of a tax assessed to B?
61. A owns a parcel of land, subject to a restriction in favor of land owned by B that no stable shall be built upon it. A's land is sold for non-payment of taxes and is bought by C. Can C build a stable upon it?
62. A is assessed on personal property at twice its fair value, and the collector distrains and sells two cows to enforce payment. If the tax had not been excessive one cow would have been sufficient. Can A replevin the other cow?
63. On the same facts can A recover the whole or any part of the tax in an action against the town?
64. (a) On the same facts can A have the sale of the second cow enjoined? (b) Would it make any difference if A was not properly taxable in the town?
65. (a) On the same facts can A recover damages from the assessors? (b) Would it make any difference if the assessors acted maliciously?
66. A state constitution requires uniform taxation. A special assessment is levied upon only a portion of the real estate in a certain town. Is this constitutional?
67. A statute provided for the payment of part of the cost of abolishing grade crossings by special assessments. Is it constitutional?
68. A statute provided that the cost of maintaining the sewerage system in a certain city should be assessed upon all real estate in the city in proportion to its value. Is it constitutional?
69. A statute provided that sidewalks should be cleared of snow by the city, and the expense assessed upon abutting property in proportion to frontage. Is it constitutional?
70. A statute provided for the erection of a union depot and the widening of certain streets as an approach to the depot and provided that the cost of the widening should be assessed on property benefited by the widening and the construction of the new depot. Is it constitutional?
71. A statute provided that the cost of laying sewers in public streets should be assessed upon abutting property in pro-

portion to frontage. Under what conditions would it be constitutional?

72. A statute provided that an assessment for the cost of constructing a street should be assessed upon adjoining property in proportion to frontage and that any party aggrieved might apply for a hearing before the board which made the assessment. An owner applied for an abatement and after a hearing was refused an abatement. He has evidence that the cost of the street was excessive owing to a corrupt arrangement between the town officials and the contractor. Has he any remedy?

QUIZ QUESTIONS
CONSTITUTIONAL LAW

PART VI

NATURALIZATION

(The numbers refer to the numbered sections in the text.)

1. Define the doctrines of perpetual allegiance and of expatriation.
2. What are the general terms of treaties permitting expatriation?
3. What are the methods of expatriation declared by United States statute?
4. State the circular instructions to diplomatic officers as to overcoming the presumption that one residing abroad has ceased to be an American citizen.
5. When is expatriation not effected?
6. Define collective naturalization.
7. What is naturalization by conquest?
8. What is naturalization by treaty?
9. In what cases was it provided that the inhabitants of ceded territory were to have all the rights of citizens of the United States?
10. What is naturalization by special act of Congress?
11. What is naturalization by admission of new states?
12. Define naturalization.
13. (a) How far have the states any power to make aliens citizens of the United States? (b) Why, and when, was the last general United States statute relative to naturalization passed?
14. (a) On what courts is the power to naturalize conferred? (b) Where must aliens reside to be naturalized?
15. What classes of people entitled to naturalization are included

in the phrase "aliens being free white persons, and aliens of African nativity and persons of African descent"?

16. (a) What registry does the commissioner of immigration make of an alien arriving in the United States? (b) In making his declaration of intention what does the alien have to state under oath?
17. What is the form of an alien's declaration of intention?
18. What are the exceptions to the requirements of declaration of intention in the case of aliens of the regular or volunteer forces of the United States and of those who have served in the navy or marine corps?
19. (a) Does a declaration of intention confer citizenship? (b) Are declarants or their minor children entitled to the protection of the United States when outside its limits?
20. (a) Within what period after the alien has made his declaration must he file his petition for naturalization? (b) What does the alien have to state under oath in his petition for naturalization?
21. What is the form of an alien's petition for naturalization?
22. (a) What are the witnesses required to state in their affidavit? (b) What documents must be filed with and attached to the petition?
23. When is the petition to be filed, how is notice to be given and what witness fees are required?
24. (a) Where is the hearing on the petition to be held? (b) Can an alien who does not speak English be naturalized? (c) What must the alien declare on oath?
25. (a) Where and for what period immediately preceding the date of his application must the alien have resided? (b) What testimony is required of the witnesses? (c) If the petitioner has not resided in the state, territory or district for the required five years, what may he establish by witnesses? (d) What are the rights of the United States as to appearing in court proceedings?
26. State in a general way the duties of the clerk.
27. What fees are to be charged and how are they to be accounted for?
28. State in a general way the provisions of the certificate of naturalization and of the stub of certificate.
29. How are fraudulent certificates of naturalization canceled?

30. What are named as criminal offences?
31. What is the status, as determined by statute, of an alien woman married to an American?
32. Is residence in the United States necessary to confer citizenship upon an alien woman married to an American?
33. What is the status of an American woman married to a foreigner?
34. Are minor children naturalized by naturalization of parent?
35. What is the status of children by naturalization of mother by marriage?
36. What is the status of illegitimate and adopted children?

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LEADING ILLUSTRATIVE CASES CONSTITUTIONAL LAW

PART I

DEFINITIONS AND GENERAL PRINCIPLES

CHAPTER II.

AMERICAN CONSTITUTIONS AND CONSTITUTIONAL LAW.

Power of the Judiciary to Declare Statutes Unconstitutional.

MARBURY v. MADISON.

1 Cranch 137 (U. S.). 1803.

[This was a petition addressed to the Supreme Court for a mandamus to compel the Secretary of State to deliver a commission to the plaintiff who had been appointed a justice of the peace for the District of Columbia. The Judiciary Act had authorized the Supreme Court to issue writs of mandamus in certain cases. The court held, however, that the issuing of such writs involved an exercise of original jurisdiction, and since the original jurisdiction of the Supreme Court had been conferred by the Constitution, the provision of the act of Congress in question was inconsistent with the Constitution and was, therefore, null and void and not binding upon the judiciary.]

MARSHALL, C. J., delivered the opinion of the court.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to enquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not a law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and rich; and that I will faithfully and impartially discharge all the duties incumbent on me as such, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

LEADING ILLUSTRATIVE CASES CONSTITUTIONAL LAW

PART II

ORGANIZATION AND POWERS OF THE UNITED STATES GOVERNMENT

CHAPTER I.

RELATIONS BETWEEN THE UNION AND THE STATES.

Implied Powers of Congress. State Taxation of Federal Agencies.

McCULLOCH v. MARYLAND.

4 Wheaton 316 (U. S.). 1819.

[This was a suit in the courts of Maryland, by that state against plaintiff in error, as cashier of the Baltimore branch of the Bank of the United States, to recover taxes claimed to be due under a statute of Maryland. Defendant questioned the validity of such statute, and from the judgment against him, brought the case to this court by writ of error.]

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty. * * *

The first question made in this cause is, has Congress power to incorporate a bank?

After refuting the proposition of counsel for the state of Maryland that the Constitution did not emanate from the people, but was a creation of sovereign and independent states, the Court said:

The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason;

the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.

* * *

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.

* * *

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

* * *

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the state of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and then the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means, calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. * * *

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not constrained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

* * * The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

* * *

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy.

* * *

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire: * * *

2. Whether the state of Maryland may, without violating the Constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely

necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. * * *

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it. * * *

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

* * *

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government. * * *

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. * * *

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This cause came on to be heard on the transcript of the record of the court of appeals of the state of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the Constitution of the United States, and void. * * * The judgment of the Supreme Court of Maryland is therefore Reversed.

Power of the United States Government to Protect Interstate Commerce and to Enforce Its Laws.

IN RE DEBS.

158 U. S. 564. 1895.

[On July 2, 1894, the district attorney for the Northern District of Illinois, acting under the direction of the Attorney-General of the United States, filed a bill of complaint in the Circuit Court of the United States for the Northern District of Illinois against these petitioners and others. The bill averred that the twenty-two railroads named therein were engaged in the business of interstate commerce and also that each of them was under contract to carry the United States mails; that four of the defendants were officers of the American Railway Union; that these four officers combined with others to compel an adjustment of a dispute between the Pullman Palace Car Company and its employes by boycotting the cars of the company; that to make the boycott effective, they had prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend such boycott against the Pullman cars by causing strikes among employes of all roads attempting to haul the same; that the defendants and others unknown proceeded by collecting together in large numbers, by threat, intimidation, force and violence, to prevent the said railways from employing other persons to fill the vacancies aforesaid; that the defendants and others unknown did with force and violence obstruct, derail, and wreck the engines and trains of the said railways, both passenger and freight, engaged in interstate commerce and in carrying the United States mails. Following these allegations was a prayer for an injunction. The court thereupon ordered an injunction commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever absolutely to desist and refrain from" doing the unlawful acts specified in the bill. The injunction was served on those of the defendants who are here as petitioners. On July 17 the district attorney filed an information for an attachment against the four defendants, and on August 1 a similar information against the other petitioners. A hearing was had before the Circuit Court, and on December 14, these petitioners were found guilty of contempt and sentenced to imprisonment in the county jail for terms varying from three to six months. Having been committed to jail, they on January 14, 1895, applied to this court for a writ of error and also a writ of habeas corpus. The former was denied on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.]

BREWER, J., delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are suggested: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in government implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state.

"The government of the Union, then, is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

"No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 405, 424.

"Both the states and the United States existed before the

Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states." Chief Justice Chase in Lane County v. Oregon, 7 Wall. 71, 76.

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land.'" Mr. Justice Bradley in *Ex parte* Siebold, 100 U. S. 371, 395. * * *

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. * * * [Here follows a consideration of the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities

The great case of Gibbons v. Ogden, 9 Wheat. 1, 197, in which the control of Congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce. The argument of the chief justice was that commerce includes navigation, "and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" In order to fully regulate commerce with foreign nations it is essential that the power of Congress does not stop at the borders of the nation, and equally so as to commerce among the states.

* * *

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. * * *

We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under § 725, Revised Statutes, which grants power "to punish by fine or imprisonment, * * * disobedience, * * * by any party * * * or other person, to any lawful writ, process, order, rule, decree or command," and enter the order of punishment complained of; and, finally, that the Circuit Court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court. * * *

The petition for a writ of habeas corpus is Denied.

Federal Taxation of State Agencies.

COLLECTOR v. DAY.

11 Wall. 113 (U. S.). 1870.

[This case resulted from an attempt to collect an internal revenue tax, under an act of Congress passed from 1864 to 1867, on the salary of a judge of the state of Massachusetts.]

NELSON, J., delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state.

In Dobbins v. The Commissioners of Erie County, 16 Pet. 435, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. * * *

The case of McCulloch v. Maryland, 4 Wheaton 316, and Weston v. Charleston, 2 Peters 449, were referred to as settling the principle that governed the case, namely, "that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." * * *

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the Amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or, to the people."

The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.

The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane County v. Oregon, 7 Wallace 76. "Both the states and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted only upon the states. But, in many of the articles of the Constitution, the necessary existence of the states, and within their proper spheres, the independent authority of the states, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution, it will be found that but few of the articles in that instrument could be carried into practical effect without the existence of the states. * * *

But we are referred to the Veazie Bank v. Fenno, 8 Wallace 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch v. Maryland, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the states since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject at all to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the states, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain. Judgment affirmed.

BRADLEY, J., filed a dissenting opinion.

Guaranties of a Republican Form of Government. Initiative and Referendum.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY v. OREGON.

223 U. S. 118. 1912.

[In error to the Supreme Court of the state of Oregon to review a judgment which affirmed a judgment of the Circuit Court for Multnomah County, in that state, enforcing a tax on the gross revenue of a domestic corporation. Dismissed for want of jurisdiction. See same case below, 53 Or. 162, 99 Pac. 427. The facts are stated in the opinion.]

WHITE, C. J., delivered the opinion of the court.

The case is this: In 1902 Oregon amended its constitution. This amendment, while retaining an existing clause vesting the exclusive legislative power in a general assembly consisting of a senate and a house of representatives, added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." [Art. 4, § 1.] Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted, when approved by popular vote, should become the law of the state. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself, or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.

In 1903 detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906, a law taxing certain classes of corporations was submitted, voted on, and promulgated by the governor in 1907 as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, 2 per centum upon their gross revenue derived from business done within the state. Penalties were provided for nonpayment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that state, made a return of its gross receipts, as required by the statute, and was accordingly assessed 2 per centum upon the amount of such return. The suit which is now before us was commenced by the state to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay, and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state constitution, as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarrassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the state, begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it, and that judgment was affirmed by the supreme court of Oregon. (53 Or. 163, 99 Pac. 427.) The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion, but by reference to the opinion in a prior case (Kadderly v. Portland, 44 Or. 118, 146, 74 Pac. 710, 75 Pac. 222), where a like controversy had been determined.

The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of article 4 of the Constitution, that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress, or is judicial in its character. Because of their absolute unity we consider all the propositions together, and therefore at once copy them. We observe, however, that in the argument the second, fourth, and fifth paragraphs, for the purposes of discussion, were subordinately classified, and these subordinate classifications we omit from our text, reproducing them, however, by a marginal reference.

I. "The initiative and the tax measure in question are repugnant to the provisions of § 1 of the Fourteenth Amendment to the

Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the law.

II. "The initiative amendment and the tax in question, levied pursuant to a measure passed by authority of the initiative amendment, violates the right to a republican form of government which is guaranteed by § 4, article 4, of the Federal Constitution.

III. "Taxation by the initiative method violates fundamental rights, and is not in accordance with 'the law of the land.' (U. S. Const., art. 6.)

IV. "The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy, and is subversive of the principles upon which the republic is founded. Direct legislation is therefore repugnant to that form of government with which alone Congress could admit a state to the Union, and which the state is bound to maintain.

V. "The Federal Constitution presupposes in each state the maintenance of a republican form of government and the existence of state legislatures, to wit.: Representative assemblies having the power to make laws; and that in each state the powers of government will be divided into three departments: a legislature, an executive, and a judiciary. One of these, the legislature, is destroyed by the initiative.

VI. "The provision in the Oregon constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union."

On the surface, the impression might be produced that the first and third propositions, the one in words relating to the equal protection clause of the Fourteenth Amendment, and the other in terms asserting "taxation by the initiative method violates fundamental rights, and is not in accordance with the law of the land," are addressed to some inherent defect in the tax or infirmity of power to levy it, without regard to the guaranty of a republican form of government. But this is merely superficial, and is at once dispelled by observing that every reason urged to support the two propositions is solely based on § 4 of article 4, and the consequent inability of the state to impose any tax of any kind which would not violate the

Fourteenth Amendment, or be repugnant to the law of the land, if in such state the initiative or referendum method is permitted. Thus dispelling any mere confusion resulting from forms of expression, and considering the substance of things, it is apparent that the second proposition, which rests upon the affirmative assertion that, by the adoption of the initiative and referendum, the state "violates the right to a republican form of government which is guaranteed by § 4 of article 4 of the Federal Constitution," and the two subdivisions made of that proposition, the first, that "the guaranty in question is to the people of the states and to each citizen, as well as to the states as political entities," and the second asserting, "§ 4 of article 4 therefore prohibits the majority in any state from adopting an unrepublican Constitution," are the basic propositions upon which all the others rest. That is to say, all the others and their subdivisions are but inducements tending to show the correctness of the second and fundamental one. This conclusion is certain, as they all but point out the various modes by which the adoption of the initiative and referendum incapacitated the state from performing the duties incumbent upon it as a member of the Union, or its obligations towards its citizens, thus causing the state to cease to be a government republican in form, within the intendment of the constitutional provision relied upon. In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And, indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is, at one and the same time, one and the same government, which is republican in form, and not of that character. Before immediately considering the text of § 4 of article 4, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for.

First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its power and rights as a member of the national government, and however all the departments of that government may recognize such state government, nevertheless, every citizen of such state, or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence of the state. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a state, and if such contention be thought well founded, to disregard the existence in fact of the state, of its recognition by all of the departments of the federal government, and practically award a decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government. And as a consequence of the existence of such judicial authority, a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one,—a right which, by its very terms, also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority. Do the provisions of § 4, article 4, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it, and thus overthrow the Constitution upon the ground that thereby the guaranty to the states of a government republican in form may be secured,—a conception which, after all, rests upon the assumption that the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other, suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case,—Luther v. Borden, 7 How. 1, 12 L. Ed. 581.

The case is from a circuit court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island, and the conflict which was brought about by the effort of the adherents of that alleged government, sometimes described as "the government established by a voluntary convention," to overthrow the established charter government. The defendants justified on the ground that the acts done by them, charged as a trespass, were done under the authority of the charter government during the prevalence of martial law, and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government, and denied the legality of the charter government. In the course of the trial the plaintiffs, to support the contention of the illegality of the charter government and the legality of the voluntary government, "although that government never was able to exercise any authority in the state, nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the state of the age of twenty-one years and upwards, and also by a large majority of those who were entitled to vote for general officers cast in favor of a constitution which was submitted as the result of a voluntary assembled convention of what was alleged to be the people of the state of Rhode Island. The circuit court rejected this evidence and instructed the jury that, as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention was also at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of, and for the purpose of sustaining, such established government. On this subject it was said (p. 38):

"For if this court is authorized to enter upon this inquiry, as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals."

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the voluntary government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) "that the inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the state, without the aid of oral evidence or the examination of witnesses, etc." It was further remarked:

"This doctrine is clearly and forcibly stated in the opinion of the supreme court of the state in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of article 4 of the Constitution of the United States. The contention of the plaintiff in error concerning that article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people; and they, in the nature of things, if the government is a free one, must have a right to change their constitution. Where, in the ordinary course, no other means exists of doing so, that right, of necessity, embraces the power to resort to revolution. As, however, no such right, it was urged, could exist under the Constitution, because of the provision of § 4 of article 4, protecting each state, on application to the legislature, or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guaranty of a republican government in form was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question, determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular state hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government, and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of article 4, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a state could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that, owing to the inherent political character of such a question, its decision was not by the Constitution vested in the judicial department of the government, but was, on the contrary, exclusively committed to the legislative department, by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the Executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 [1 Stat. at L. 424, chap. 36], had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States, on the application of the legislature of a state or of the governor, to call out the militia of any other state or states to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of article 4 was a judicial one, the duty to afford protections from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009, where, after disposing of a contention made concerning the 14th Amendment, and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guaranty of § 4 of article 4, it was said (p. 578):

"But it is said that the 14th Amendment must be read with § 4 of article 4, of the Constitution, providing that 'the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence.'

"It was long ago settled that the enforcement of this guaranty belonged to the political department. Luther v. Borden, 7 How. 1, 12 L. Ed. 581. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it."

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different; that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

Relation Between the United States and the States.

TEXAS v. WHITE, ET AL.

7 Wall. 700 (U. S.). 1868.

The Chief Justice delivered the opinion of the court.

This is an original suit in this court, in which the state of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the national government, and to compel the surrender of the bonds to the state. * * *

The first inquiries to which our attention was directed by counsel arose upon the allegations of the answer of Chiles (1) that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the state of Texas; and (2) that the state, having severed her relations with a majority of the states of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the national courts.

The first of these allegations is disproved by the evidence.

* * *

The other allegation presents a question of jurisdiction. It is not questioned that this court has original jurisdiction of suits by states against citizens of other states, or that the states entitled to invoke this jurisdiction must be states of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such states.

If, therefore, it is true that the state of Texas was not at the time of filing of this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. * * *

It [the word state] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. * * *

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country. * * *

In all respects, so far as the objects could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other confederate states, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other state officer in Texas, who recognized the national authority. Nor was any officer of the United States permitted to exercise any authority whatever under the national government within the limits of the states, except under the immediate protection of the national military forces.

Did Texas, in consequence of these acts, cease to be a state? Or, if not, did not the state cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a state to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The union of the states never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. Under the Articles of Confederation, each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the states in union, there could be no such political body as the United States." (County of Lane v. The State of Oregon, 7 Wallace, 76.)

Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union and under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible states.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guaranties of republican government in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. There was no place for consideration, or revocation, except through revolution, or through consent of the states.

Considered, therefore, as transacted under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. It this were otherwise, the state must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the national government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a state, of the right to sue in this court, there needs to be a state government, competent to represent the state in its relations with the national government so far, at least, as the institution and prosecution of a suit is concerned.

After reviewing the reconstruction acts and the reorganization of the states thereunder, the Court said: It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the state was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the state in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the state. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. * * *

On the whole case, therefore, our conclusion is that the state of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

CHAPTER II.

POWERS OF THE PRESIDENT.

War and Military Power.

MARTIN v. MOTT.

12 Wheat. 19 (U. S.). 1827.

[The case is stated in the opinion of the court.]

STORY, J., delivered the opinion of the court.

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the state of New York, being the highest court of that state, and is brought here in virtue of the 25th section of the Judiciary Act of 1789, c. 20. * * *

For the more clear and exact consideration of this subject, it may be necessary to refer to the Constitution of the United States, and some of the provisions of the act of 1795. The Constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the Constitution. It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. * * *

If we look at the language of the Act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "Whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the Constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot, therefore, be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the Act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny. * * *

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed; and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

CHAPTER III.

THE POWERS OF CONGRESS.

Power of the United States Government to Give the Legal Tender Quality to Paper Currency.

JUILLIARD v. GREENMAN.

110 U. S. 421. 1884.

GRAY, J., delivered the opinion of the court.

After calling attention to the provisions of the Legal Tender Acts of 1862 and 1863, and the Act of May 31, 1878, under which the notes in question were reissued, the court said:

* * * The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the Act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall. 457; Dooley v. Smith, 13 Wall. 604; Railroad Company v. Johnson, 15 Wall. 195; and Maryland v. Railroad Company, 22 Wall. 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the Legal Tender Cases, and in the earlier case of Hepburn v. Griswold, 8 Wall. 603, which those cases overruled, forcibly present the arguments on either side of the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts.

Without undertaking to deal with all those arguments, the court has thought it fit that the grounds of its judgment in the case at bar should be fully stated.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in McCulloch v. Maryland, 4 Wheat. 316, by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a national government, with sovereign powers, legislative, executive, and judicial. "The government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme laws of the land." "Among the enumerated powers of government, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." 4 Wheat. 405, 406, 407.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is a constitution we are expounding." 4 Wheat. 107. See also page 415.

The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses:—

"The Congress shall have power

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United States as a sovereign government. But, in whichever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of United States v. Fisher, 2 Cranch 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England gave to debts due the Crown. * * *

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank v. Fenno, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all state banks, or national banks, or private bankers, paying out the notes of individuals or of state banks, a tax of ten per cent. upon the amount of such notes so paid out. Veazie Bank v. Fenno, above cited; National Bank v. United States, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactment, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several states are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the states only. This section prohibits the states from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the states equally are expressly prohibited from passing any bill of attainder or ex post facto law, or granting any title of nobility. The states are forbidden, while the President and Senate are expressly authorized, to make treaties. The states are forbidden, but Congress is expressly authorized, to coin money. The states are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. Austria v. Day, 2 Giff. 628, and 3 D. F. & J. 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See Craig v. Missouri, 4 Pet. 435, 453; Briscoe v. Bank of Kentucky, 11 Pet. 257, 313, 334-336; Legal Tender Cases, 12 Wall. 557, 558, 622; Phillips on American Paper Currency. * * * The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States. * * *

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this. * * * Judgment affirmed.

Power of Congress to Prohibit the Transportation of Lottery Tickets Through the Mails.

IN RE RAPIER.

143 U. S. 110. 1892.

FULLER, C. J., delivered the opinion of the court.

We are constrained by the circumstances in which we find ourselves placed by the illness and death of Mr. Justice Bradley, to whom the preparation of the opinion in these cases was committed, to waive any elaboration of our views, and confine ourselves to the expression of the general grounds on which our decision proceeds.

These are applications for discharge by writ of habeas corpus from arrest for alleged violations of an act of Congress, approved September 19, 1890, entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes." 26 St., p. 465.

The question for determination relates to the constitutionality of § 3894 of the Revised Statutes as amended by that act. In Ex parte Jackson, 96 U. S. 727, it was held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's Case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. That was necessarily so, for the real question was the existence of the power, and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that, in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true; but, while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The states, before the Union was formed, could establish post offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post offices and post roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se,* and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se,* including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of the petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged, within the intent and meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In short, we do not find sufficient grounds in the arguments of counsel, able and exhaustive as they have been, to induce us to change the views already expressed in the case to which we have referred. We adhere to the conclusion therein announced.

The writs of habeas corpus prayed for will therefore be denied, and the rules hereinbefore entered discharged.

Extension of the Constitution to the Territories.

DOWNES v. BIDWELL.

182 U. S. 244. 1901.

[In error to the circuit court of the United States for the Southern District of New York, to review a judgment sustaining a demurrer to a complaint in the action to recover back duties paid under protest on importations from Porto Rico under the Foraker act.]

BROWN, J., made the statement for the court.

This was an action begun in the circuit court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $639.35, exacted and paid under protest upon certain oranges consigned to the plaintiff at New York and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the island of Porto Rico, known as the Foraker act.

BROWN, J., announced the conclusion and judgment of the court:

This case involves the question whether merchandise brought into the ports of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the third section of that act, which requires a payment of "15 per centum of the duties which are to be required to be levied, collected and paid on like articles of merchandise imported from foreign countries." * * *

2. In the case of De Lima v. Bidwell, just decided, 182 U. S., we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." Art. 1, § 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of violation of uniformity clause, but because by § 9, "Vessels bound to or from one state" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question, whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument in the opinion of its contemporaries, in the practical construction put upon it by Congress and by the decisions of this court. * * *

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution, giving jurisdiction in cases between citizens of the different states.

2. That territories are not states within the meaning of the Revised Statutes, § 709, permitting writs of error from this court in cases where the validity of a *state* statute is drawn in question.

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property.

4. That the territories are not within the clause of the Constitution, providing for the creation of a Supreme Court, and such inferior courts as Congress may see fit to establish.

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully

provide for such trials, before consular tribunals, without the intervention of a grand or petit jury.

6. That where the Constitution has once been formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith. * * *

It is obvious that in the annexation of outlying and distant possessions, grave questions will arise from differences from rates, habits, laws, and customs of the people, and from differences of soil, climate and production which may require action on the part of Congress, that would be quite unnecessary in the annexation of contiguous territory, inhabited only by people of the same race, or by scattered bodies of native Indians. * * *

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants, whether they shall be introduced into the sisterhood of states, or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. * * *

The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself and little in the interpretation put upon it to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution it should be followed by the judicial department. * * *

We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such islands, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the circuit court is therefore Affirmed.

Power of Congress to Admit New States to the Union. Equality of the States.

COYLE v. SMITH.

221 U. S. 559. 1911.

LURTON, J., delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the state, providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the state for the purpose of carrying out the act by the erection of the necessary state buildings. Acts of Oklahoma, December 29, 1910.

The question reviewable under this writ of error, if any there be, arises under the claim set up by the petitioner, and decided against him, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the state at Oklahoma City, was void as repugnant to the enabling act of Congress of June 16, 1906, under which the state was admitted to the Union. 34 Stat. at L., chap. 3335, p. 267. The act referred to is entitled, "An Act to Enable the People of Oklahoma and of the Indian Territory to Form a Constitution and State Government and Be Admitted into the Union on an Equal Footing with the Original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The second section is lengthy and deals with the organization of a constitutional convention, and concludes in these words: "The capital of said state shall temporarily be at the city of Guthrie * * * and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen; but said capital shall, after said year, be located by the electors of said state at an election to be provided for by the legislature; provided, however, that the legislature of said state, except as shall be necessary for the convenient transaction of the public business of said state at said capital, shall not appropriate any public moneys of the state for the erection of buildings for capital purposes during said period." * * *

The twenty-second and last section, applicable to Oklahoma, reads thus: "That the constitutional convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this act."

The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses,* it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of governmen. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to "every state in this Union a republican form of government." The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that, "new states may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states." * * * The power is to admit "new states into *this* Union."

"This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. * * *

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the Constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state constitution, and not that of an act of Congress. * * *

In Bolln v. Nebraska, 176 U. S. 83, 87, 44 L. ed. 382, 383, 20 Sup. Ct. Rep. 287, it appeared that the act under which Nebraska had been admitted [14 Stat. at L. 391, chap. 36] had, among other things, required the convention organized to form a constitution for the proposed state to adopt for the people of that state the Constitution of the United States. This was done. It was claimed as a result that the power of the state to authorize the prosecution of a felony by information had been restricted, because the United States could, under one of the amendments to the Constitution, prosecute only by indictment. In respect to this claim the Court said:

"But conceding all that can be claimed in this connection, and that the state of Nebraska did enter the Union under the condition of the enabling act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the state acknowledged, as every other state has done, the supremacy of the Federal Constitution. The first section of the Act of 1867, admitting the state into the Union, declared: That 'it is hereby admitted into the Union upon an equal footing with the original states in all respects whatsoever.' It is impossible to suppose that, by such indefinite language as was used in the enabling act, Congress intended to differentiate Nebraska from her sister states, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her constitution from that given to the constitutions of other states. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force except as voluntarily adopted after such territory has become a state of the Union. Upon the admission of a state it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original states, and, in the language of the Act of 1867, admitting the state of Nebraska, it stands 'upon an equal footing with the original states in all respects whatsoever.' "

We are unable to find in any of the decisions of this court cited by counsel for the plaintiff in error anything which contravenes the view we have expressed. * * *

No good can result from a consideration of the other cases cited by plaintiff in error. None of them bear any more closely upon the question here involved than those referred to. If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity, and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new state have complied with the terms of the act, that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original states.*" The proclamation has been issued and the Senators and Representatives from the state admitted to their seats in Congress.

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

In Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237, Chief Justice Chase said in strong and memorable language that "the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible states."

In Lane County v. Oregon, 7 Wall. 76, 19 L. Ed. 104, he said:

"The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment Affirmed.

McKENNA and HOLMES, J. J., dissent.

LEADING ILLUSTRATIVE CASES CONSTITUTIONAL LAW

PART III

CONSTITUTIONAL GUARANTIES OF FUNDAMENTAL RIGHTS.

CHAPTER I.

THE CONSTITUTION AS A BILL OF RIGHTS.

Federal Bill of Rights.

BARRON v. BALTIMORE.

7 Pet. 243 (U. S.). 1833.

Error to the court of appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore to recover damages for injuries to the wharf property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporated authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf and thereby rendered the water shallow and prevented the access of vessels. The decision of Baltimore County Court was against the defendant, and a verdict for $4,500 was rendered for the plaintiff. The court of appeals reversed the judgment of Baltimore County Court and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals prosecuted a writ of error to this court.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the judicial act, 1 Stats. at Large, 85.

The plaintiff in error contends that it comes within that clause in the 5th amendment to the Constitution, which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own Government, and not for the Government of the individual States. Each State established a Constitution for itself, and in that Constitution, provided such limitations and restrictions on the powers of its particular Government as its judgment dictated. The people of the United States framed such a Government for the United States as is supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this Government were to be exercised by themselves; and the limitations on power, if express in general terms, are naturally, and, we think, necessarily applicable to the Government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct Governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general Government, not as applicable to the States. In their several Constitutions they have imposed such restrictions on their respective Governments as their own wisdom suggested. Such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State Governments; as well as against that which might be attempted by their general Government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general Government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the Government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have already been suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive in language, contains no restriction on State legislature.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general Government, the tenth proceeds to enumerate those which were to operate on the State legislature. These restrictions are brought together in the same section, and are by expressed words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the Government of all, no limitation of the action of the Government on the people would apply to the State Government, unless expressed in terms; the restrictions contained in the tenth section, are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain the State legislature on subjects intrusted to the general Government or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general Government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate these several limitations on the powers of the States which are contained in this section. They will be found generally, to restrain State legislations on subjects entrusted to the Government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discriminations between the limitations it imposes on the power of the general Government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent,—some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or in any of them, required changes in their Constitution; had they required additional safeguards to liberty from the apprehended encroachments of their particular Governments; the remedy was in their own hands and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring the recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations of the powers of the State Governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitution of the several States, by affording the people additional protection from the exercise of power by their own Governments in the matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great Revolution which established the Constitution of the United States was not affected by immense opposition. Serious fears were extensively entertained that those powers which the patriotic statesmen, who then watched over the interests of the country, deemed essential to Union, and the attainment of those invaluable objects for which Union was sought, might be exercised in a manner dangerous to liberty. In almost every convention, by which the Constitution was adopted, amendments to guard against the abuse of power were commended. These amendments demanded security against the apprehended encroachments of the general Government, not against those of the local Governments.

In compliance with the sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State Government. This court cannot so apply them. We are of the opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are, therefore, of opinion that there is no repugnancy between the several Acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

Federal Guaranties as Affecting the Inhabitants of Territorial Possessions.

DORR v. UNITED STATES.

195 U. S. 138, 24 Sup. Ct. 808. 1904.

In error to the Supreme Court of the Philippine Islands, to review a judgment which affirmed a conviction of libel in the court of first instance of the city of Manila.

MR. JUSTICE DAY delivered the opinion of the court.

The case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused, and denied by the courts established in the islands.

The recent consideration by this court, and the full discussion had in the opinions delivered in the so-called "Insular cases," render superfluous any attempt to reconsider the constitutional relation of the powers of the Government to territory acquired by a treaty cession to the United States. De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770. The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, the right to a jury trial in outlying territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government. "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be derived either expressly or by implication from that instrument." Downes v. Bidwell, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, and cases cited. It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its earliest decisions. The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument, in article 4, section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of Sere v. Pitot, 6 Cranch, 332, 3 L. ed. 240, Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject (American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. ed. 242, 255), says:

"The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the Government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the State.

"On the 22d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' (8 Stat. at L. 256.)

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' "

While these cases, and others which are cited in the late case of Downes v. Bidwell, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, sustain the right of Congress to make laws for the Government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in Union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of Scott v. Sandford, 19 How. 614, 15 L. ed. 787, said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial Government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in Downes v. Bidwell, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case the practical question is: Must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United

States (30 Stat. at L. 1759), carefully refrained from so doing; for it is expressly provided that (article 9): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 691, chap. 1369), there is express provision that section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article 3, section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article 6 of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It was said in the Mankichi Case, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a Government for territory in execution of the powers conferred upon Congress.

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (right to trial by jury and presentment by grand jury) are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

As we have had occasion to see in the case of Kepner v. United States, 195 U. S. 100, 24 Sup. Ct. Rep. 797, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new Government the guaranties of the Bill of Rights securing those safeguards to life and liberty which are deemed essential to our Government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry, and whose judgments were not final until passed in review before the audiencia, or superior court, with right of final review, and power to grant a new trial for errors of law, in the Supreme Court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President, and sanctioned by act of Congress (act of July 1, 1902, 32 Stat. at L. 691, chap. 1369), has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the Kepner Case, 195 U. S. 100, 24 Sup. Ct. Rep. 797, the accused is given the right of appeal from the judgment of the court of first instance to the Supreme Court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a Government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories?

The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized peoples, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the States, did not leave to implication alone the power to govern and control territory owned or to be acquired, but, in the article quoted, expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as States, territories must be governed by laws. The limitations of this power were suggested by Mr. Justice Curtis in the Scott Case, above quoted, and Mr. Justice Bradley, in the Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

This language was quoted with approbation by Mr. Justice Brown in Downes v. Bidwell, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, and in the same case Mr. Justice White said: "Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local Governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government, which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

In treating of article 4, section 3, Judge Cooley, in his work on Constitutional Law, says:

"The peculiar wording of the provision (section 3, article 4) has led some persons to suppose that it was intended Congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute Governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of Government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the Government, originating before the adoption of the Constitution, has been for Congress to establish Governments for the territories; and whether the jurisdiction over the district has been acquired by grant from the States, or by treaty with a foreign power, Congress has unquestionably full power to govern it; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-Government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined." Cooley, Principles of Const. Law, 164.

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, section 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.

(Other assignments of error are discussed.)

Judgment affirmed.

MR. JUSTICE PECKHAM, concurring (in a separate opinion, to which the Chief Justice and Mr. Justice Brewer agreed).

MR. JUSTICE HARLAN dissented.

CHAPTER II.

POLITICAL PRIVILEGES AND THEIR PROTECTION.

Federal Citizenship.

UNITED STATES v. WONG KIM ARK.

169 U. S. 649, 18 Sup. Ct. 456. 1898.

This was a writ of habeas corpus, issued October 2, 1895, by the District Court of the United States for the Northern district of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than 21 years of age, and was born at San Francisco in 1873, of parents of Chinese descent, and subjects of the Emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic, in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the Constitution and Laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretense that he was not a citizen of the United States.

MR. JUSTICE GRAY, after stating the facts in the foregoing language, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China. They were at the time of his birth domiciled residents of the United States, having previously established and are still enjoying a permanent domicile and residence therein at San Francisco. They continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States, they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to-wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about 17 years of age) he departed for China, on a temporary visit, and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about 21 years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit, and with the intention of returning to the United States; and he did return thereto, by sea, in August, 1895, and applied to the collector of customs for permission to land, and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the Acts of Congress known as the "Chinese Exclusion Acts," prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the Constitution: "All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." Article 2, section 1. The fourteenth article of amendment besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the fifteenth article of amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Amend. Art. 14. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the

Constitution. Minor v. Happersett, 21 Wall. 162; Ex parte Wilson, 114 U. S. 417, 422, 5 Sup. Ct. 935; Boyd v. U. S., 116 U. S. 616, 624, 625, 6 Sup. Ct. 524; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Comm. 336; Bradley, J., in Moore v. U. S., 91 U. S. 270, 274.

In Minor v. Happersett, Chief Justice Waite, when construing, in behalf of the court, the very provision of the fourteenth amendment now in question, said: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167.

In Smith v. Alabama, Mr. Justice Matthews, delivering the judgment of the court, said: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." 124 U. S. 478, 8 Sup. Ct. 569.

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the King. The principle embraced all persons born within the King's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, "Protectio trahit subjectionem, et subjectio protectionem,"—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the King.

This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case known as "Calvin's Case," or the "Case of the Postnati," decided in 1608, after a hearing in the exchequer chamber before the lord chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Coke, 1, 4b-6a, 18a, 18b; Ellesmere, Postnati, 62-64; s. c. 2 How. St. Tr. 559, 607, 613-617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Litt. 8a, 128b; Lord Hale, in Harg. Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Comm. 366, 369, 370, 374; 4 Bl. Comm. 74, 92; Lord Kenyon, in Doe v. Jones, 4 Term R. 300, 308; Cockb. Nat. 7; Dicey, Confl. Laws, pp. 173-177, 741.

In Udny v. Udny (1869) L. R. 1 H. L. Sc. 441, the point decided was one of inheritance, depending upon the question whether the domicile of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: "The question of naturalization and of allegiance is distinct from that of domicile." Page 452. Lord Westbury, in the passage relied on by the counsel for the United States, began by saying: "The law of England, and of almost all civilized countries, ascribed to each individual at his birth two distinct legal states or conditions,—one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status." And then, while maintaining that the civil status is universally governed by the single principle of domicile (domicilium), the criterion established by international law for the purpose of determining civil status, and the basis on which "the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend,'' he yet distinctly recognized that a man's political status, his country (patria), and his ''nationality,—that is, natural allegiance,"—''may depend on different laws in different countries.'' Pages 457, 460. He evidently used the word ''citizen,'' not as equivalent to ''subject,'' but rather to ''inhabitant''; and had no thought of impeaching the established rule that all persons born under British dominion are natural-born subjects.

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: ''By the common law of England, every person born within the dominions of the crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality.'' Cockb. Nat. 7.

Mr. Dicey, in his careful and thoughtful Digest of the Law of England with Reference to the Conflict of Laws, published in 1896, states the following propositions, his principal rules being printed below in italics: *'' 'British subject' means any person who owes permanent allegiance to the crown.* 'Permanent' allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien, who, because he is within the British dominions, owes 'temporary' allegiance to the crown. *'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth.'' ''Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject.* This rule contains the leading principle of English law on the subject of British nationality.'' The exceptions afterwards mentioned by Mr. Dicey are only these two: ''(1) Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien.'' ''(2) Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien." And he adds: "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the King of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the crown." Dicey, Confl. Laws, pp. 173-177, 741.

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

In the early case of The Charming Betsy (1804) it appears to have been assumed by this court that all persons born in the United States were citizens of the United States, Chief Justice Marshall saying: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." 2 Cranch, 64, 119.

In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99, in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English colonies in America. Mr. Justice Thompson, speaking for the majority of the court, said: "It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects." Id. 120. Mr. Justice Johnson said: "He was entitled to inherit as a citizen born of the State of New York." Id. 136. Mr. Justice Story stated the reasons upon this point more at large, referring to Calvin's Case, Blackstone's Commentaries, and Doe v. Jones, above cited, and saying: "Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." Id. 155. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." Id. 156. "Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." Id. 164.

In Shanks v. Dupont, 3 Pet. 242, decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the treaty of peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case that Mr. Justice Story, delivering the opinion of the court, said: "The incapacities of femes covert, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations." Id. 248. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States, for he referred (page 245) to the contemporaneous opinions in Inglis v. Sailors' Snug Harbor, above cited, in which this rule had been distinctly recognized, and in which he had said (page 162) that "each government had a right to decide for itself who should be admitted or deemed citizens." And in his treatise on the Conflict of Laws, published in 1834, he said that, in respect to residence in different countries or sovereignties, "there are certain principles which have been generally recognized, by tribunals administering public law [adding, in later editions, 'or the law of nations'] as of unquestionable authority;"

and stated, as the first of those principles: "Persons who are born in a country are generally deemed citizens and subjects of that country." Story, Confl. Laws, section 48.

The English statute of 11 and 12 Wm. III. (1700) c. 6, entitled "An act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens," enacted that "all and every person or persons, being the King's natural-born subject or subjects, within any of the King's realms or dominions," might and should thereafter lawfully inherit and make their titles by descent to any lands "from any of their ancestors, lineal or collateral, although the father and mother, or father, or mother, or other ancestor, of such person or persons, by, from, through or under whom" title should be made or derived, had been or should be "born out of the King's allegiance, and out of His Majesty's realms and dominions," as fully and effectually, as if such parents or ancestors "had been naturalized or natural-born subject or subjects within the King's dominions." 7 Statutes of the Realm, 590. It may be observed that, throughout that statute, persons born within the realm, although children of alien parents, were called "natural-born subjects." As that statute included persons born "within any of the King's realms or dominions," it of course extended to the colonies, and, not having been repealed in Maryland, was in force there.

The supreme judicial court of Massachusetts, speaking by Mr. Justice (afterwards Chief Justice) Sewell, early held that the determination of the question whether a man was a citizen or an alien was "to be governed altogether by the principles of the common law," and that it was established, with few exceptions, "that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.'" Gardner v. Ward (1805) 2 Mass. 244, note. And again: "The doctrine of the common law is that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory where the person owing the allegiance was born.'' Kilham v. Ward (1806) Id. 236, 265. It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the Queen's bench division that the statutes of 4 Geo. II. (1731) c. 21, and 13 Geo. III. (1773) c. 21 (hereinafter referred to), ''clearly recognize that to the King in his politic, and not in his personal, capacity, is the allegiance of his subjects due.'' Isaacson v. Durant, 17 Q. B. Div. 54, 65.

The Supreme Court of North Carolina, speaking by Mr. Justice Gaston, said: ''Before our Revolution, all free persons born within the dominion of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens.'' ''Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European King to a free and sovereign state.'' ''British subjects in North Carolina became North Carolina freemen;'' ''and all free persons born within the state are born citizens of the State.'' ''The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of Government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the King' is now 'a citizen of the State.' '' State v. Manuel, (1838) 4 Dev. & B. 20, 24-26.

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the constitution, when the matter was elaborately argued in the Court of Chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. Lynch v. Clarke, (1844) 1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, Secretary of State, in 1854 (2 Whart. Int. Dig. [2d Ed.] p. 394); by Attorney General Black in 1859 (9 Ops. Attys. Gen. 373); and by Attorney General Bates in 1862 (10 Ops. Attys. Gen. 328, 382, 394, 396).

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IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile"; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." Poth. Traité des Personnes, pt. 1, tit, 2, § 1, Nos. 43, 45; Walsh-Serrant v. Walsh-Serrant (1802) 3 Journal du Palais, 384, 8 Merlin, Jurisprudence, "Domicile" (5th Ed.) § 13; Préfet du Nord v. Lebeau (1862) Journal du Palais 1863, 312, and note; 1 Laurent, Droit Civil, No. 321; 2 Calvo, Droit International (5th Ed.) § 542; Cockb. Nat. 13, 14; Hall, Int. Law (4th Ed.) § 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions from the one adopted by the constituent assembly in 1791 to that of the French republic in 1799. Constitutions et Chartes (Ed. 1830) pp. 100, 136, 148, 186. The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, jus soli, the rule of descent or blood, jus sanguinis, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe,—'De la vieille règle française, ou plutôt même de la vieille règle européenne,'—according to which nationality had always been, in former times, determined by the place of birth." 1 Domolombe, Cours de Code Napoleon (4th Ed.) No. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the constitution of the United States. The English naturalization act of 33 Vict. (1870) c. 14, and the commissioners' report of 1869, out of which it grew, both bear date since the adoption of the fourteenth amendment of the constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Confl. Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockb. Nat. 14-21.

There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. * * *

By the constitution of the United States, Congress was empowered to "establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, beginning with the act entitled "An act to establish an uniform rule of naturalization," passed at the second session of the first Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts March 26, 1790, c. 3 (1 Stat. 103); January 29, 1795, c. 20 (Id. 414); June 18, 1798, c. 54 (Id. 566); April 14, 1802, c. 28 (2 Stat. 153); March 26, 1804, c. 47 (Id. 292); February 10, 1855, c. 71 (10 Stat. 604); Rev. St. §§ 2165, 2172, 1993.

So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective) conferring citizenship on foreign-born children of citizens have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country which have gone the furthest towards holding such statutes to be but declaratory of the common law have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent, Comm. 39, 50, 53, 258, note; Lynch v. Clarke, 1 Sandf. Ch. 583, 659; Ludlam v. Ludlam, 26 N. Y. 356, 371.

Passing by questions once earnestly controverted, but finally put at rest by the fourteenth amendment of the constitution, it is beyond doubt that, before the enactment of the civil rights act of 1866 or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-Ninth Congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Act April 9, 1866, c. 31, § 1 (14 Stat. 27).

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the fourteenth amendment of the constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several States; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the Legislatures of the requisite number of States. 14 Stat. 358; 15 Stat. 708.

The first section of the fourteenth amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Scott v. Sanford (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. Slaughter House Cases (1873) 16 Wall. 36, 73; Strauder v. West Virginia (1879) 100 U. S. 303, 306; Ex parte Virginia (1879, Id. 339, 345; Neal v. Delaware (1880) 103 U. S. 370, 386; Elk v. Wilkins (1884) 112 U. S. 94, 101, 5 Sup. Ct. 41. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the Slaughter House Cases, above cited.

In those cases the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for 25 years to have and maintain slaughter houses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughter houses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the State, and not in conflict with the thirteenth amendment of the Constitution, as creating an involuntary servitude, nor with the fourteenth amendment, as abridging the privileges or immunities of citizens of the United States, or as depriving persons of their liberty or property without due process of law, or as denying to them the equal protection of the laws.

Mr. Justice Miller, delivering the opinion of the majority of the court, after observing that the thirteenth, fourteenth, and fifteenth articles of amendment of the constitution were all addressed to the grievances of the negro race, and were designed to remedy them, continued as follows: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the States, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." 16 Wall. 72. And, in treating of the first clause of the fourteenth amendment, he said: "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." Id. 73, 74. * * *

The only adjudication that has been made by this court upon the meaning of the clause "and subject to the jurisdiction thereof," in the leading provision of the fourteenth amendment, is Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds that the meaning of those words was "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance"; that by the constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in Congress and direct taxes were apportioned among the several States, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several States, but "with the Indian tribes"; that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used in defining citizenship, in the first section of the civil rights act of 1866, by the very Congress which framed the fourteenth amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99-103, 5 Sup. Ct. 44-46.

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The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the fourteenth amendment of the constitution, in qualifying the words "all persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national Government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Coke, 1, 18b; Cockb. Nat. 7; Dicey, Confl. Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155; 2 Kent, Comm. 39, 42. * * *

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the fourteenth amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

By the civil rights act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, "not subject to any foreign power," gave way, in the fourteenth amendment of the constitution, to the affirmative words, "subject to the jurisdiction of the United States."

This sentence of the fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.

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The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Coke, 6a, "strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject"; and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when Secretary of State, in his report to the President on Thrasher's case in 1851, and since repeated by this court: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign Government, owes obedience to the laws of that Government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations." Executive Documents H. R. No. 10, 1st Sess. 32d Cong. p. 4; 6 Webster's Works, 526; U. S. v. Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Coke, 6a; Ellesmere, Postnati, 63; 1 Hale, P. C. 62; 4 Bl. Comm. 74, 92.

To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth amendment, which declares and ordains that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. * * *

The acts of Congress, known as the "Chinese Exclusion Acts," the earliest of which was passed some fourteen years after the adoption of the constitutional amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the emperor of China, though having acquired a commercial domicile in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. * * *

The fourteenth amendment of the constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only,—birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." Osborn v. Bank, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of Congress a fortiori, no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic." Rev. St. § 1999, re-enacting Act July 27, 1868, c. 249, § 1 (15 Stat. 223, 224). Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry, inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about 17 years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

[MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, dissented.]

Suffrage.

MINOR v. HAPPERSETT.

21 Wall. 162 (U. S.). 1874.

The CHIEF JUSTICE delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons and by the fourteenth amendment, "All persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be the citizen of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the Government. Citizen is now more commonly employed, however, and as it has been considered better suited to the descriptions of one living under a republican government it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was ordained and established by "the people of the United States," and then going further back, we find that there were the people of the several States that had before dissolved the political bands which connected them with Great Britain and assumed a separate and equal station among the powers of the earth, and that had by Articles of Confederation and Perpetual Union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade or any other pretence whatever.

Whoever, then, was one of the people of either of these States, when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides that "no person except a natural-born citizen or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President," and that Congress shall have power to "establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization. * * *

It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiff proceeds upon that idea.

Under the power to adopt a uniform system of naturalization Congress, as early as 1790 provided "that any alien, being a free white person," might be admitted as a citizen of the United States and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. * * *

As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath; and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married, or who should be married to a citizen of the United States should be deemed and taken to be a citizen.

From this it is apparent that from the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislation and judicial history of the country. * * *

In the legislative department of the Government similar proof will be found. Thus, in the pre-emption laws, a widow "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified and women, "being citizens of the United States" are permitted to avail themselves of the benefit of the homestead law.

Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State of which she is a citizen from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship upon her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. * * *

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the State, but it operates for this purpose, if at all, through the States and the State law and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of these constitutions we find that in no State were all citizens permitted to vote.

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In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, Section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for the President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a Government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their constitution and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So also of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it, by due process of law, but in order to claim protection he must first show that he has the right. * * *

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship did not necessarily confer the right of suffrage.

If uniform practice long continued can settle the construction of so important an instrument as the constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to the women's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States, which commit that important trust to men alone, are not necessarily void, we

Affirm the judgment.

Republican Form of Government.

TEXAS v. WHITE ET AL.

7 Wall. 700 (U. S.). 1868.

(See Part II.)

The other allegation presents a question of jurisdiction. It is not questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. * * *

It [the word state] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. * * *

In the Constitution the term state most frequently expresses the combined idea just noted, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country. * * *

In all respects, so far as the objects could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National Government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means applies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." (County of Lane v. The State of Oregon, 7 Wallace, 76.) Not only therefore can there be no loss of separate and independent autonomy to the States, through their union and under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transacted under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligation of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National Government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National Government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at naught. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, Senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court.

All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens, of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National Government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immeditely disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever question might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stats. at Large, 737) by President Lincoln, in December, 1863, and by President Johnson, in May, 1865 (Ib., 758). And emancipation was confirmed, rather than ordained, in the insurgent States by the Amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States (Ib., 774, 775).

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guarantee clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National Government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional Governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island (Luther v. Borden, 7 Howard, 42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867 (14 Stats. at Large, 428), the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. * * *

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

[JUSTICES GRIER, SWAYNE and MILLER dissented.]

CHAPTER IV.

PROTECTION OF PERSONS ACCUSED OF CRIME.

The Accusation—Indictment Not Essential to Due Process.

HURTADO v. CALIFORNIA.

110 U. S. 516, 4 Sup. Ct. 111. 1884.

The Constitution of the State of California, adopted in 1879, in Article I, section 8, provides as follows:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment without such examination and commitment as may be prescribed by law. A grand jury shall be summoned at least once a year in each county." * * *

Hurtado, having been charged with murder by an information filed with the District Attorney, was tried by jury, convicted, and sentenced to be hanged. Thereupon he filed certain objections to the execution of the sentence, one of which recited "that the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."

MR. JUSTICE MATTHEWS delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. * * * (Here follow citations from Kalloch v. Superior Court, 56 Cal., 229, and Rowan v. The State, 30 Wis., 129.)

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones v. Robbins, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty. * * * It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of different kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com., 310." * * *

This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in Jones v. Robbins, 8 Gray, 329, who states his conclusions in these words:

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also State v. Starling, 15 Rich. (S. C.), Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ:*

"But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com., 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says:

"The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in Westervelt v. Gregg, 12 N. Y., 202, by Denio, J., p. 212:

"The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the Government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat., 235-244:

"As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356:

"The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray's Lessee v. Hoboken Land & Improvement Company, 18 How., 272. There Mr. Justice Curtis delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law"; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. * * *

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir

James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep., 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. * * * (Here are given quotations from Munn v. Ill., 94 U. S., 113; Walker v. Savinet, 92 U. S., 90; Kennard v. Louisiana, 92 U. S., 480; Davidson v. N. O., 96 U. S., 97.)

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." (It then immediately adds:) "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * * (Here follows a citation from Missouri v. Lewis, 101 U. S., 22-31.)

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its objects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The Supreme Court of Mississippi, in a well-considered case, —Brown v. Levee Commissioners, 50 Miss., 468,—speaking of the meaning of the phrase "due process of law," says: "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

(Here follows a citation from Loan Association v. Topeka, 20 Wallace, 655-662.)

* * * * * * *

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

The Constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty; notwithstanding which it is no doubt justly said in Swift's digest, 17, that

"This sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this State in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land."

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment, by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com., 305):

"And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is Affirmed.

MR. JUSTICE HARLAN rendered a dissenting opinion.

CHAPTER V.

DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AS AFFECTING PERSONAL AND PROPERTY RIGHTS—THE POLICE POWER.

Freedom of Contract.

McLEAN v. ARKANSAS.

211 U. S. 539, 29 Sup. Ct. 206. 1909.

In error to the Supreme Court of the State of Arkansas to review a judgment which affirmed a conviction in the Circuit Court of Sebastian County, in that State, for screening coal before it has been weighed and credited to the miner sending it to the surface.

MR. JUSTICE DAY delivered the opinion of the court.

This proceeding is brought to review the judgment of the Supreme Court of Arkansas (81 Ark. 304, 98 S. W. 729), affirming a conviction of the plaintiff in error for violation of a statute of the State of Arkansas, entitled "An Act to Provide for the Weighing of Coal Mined in the State of Arkansas as It Comes from the Mine, and before It Is Passed over a Screen of Any Kind." * * *

The objections to the judgment of the State Supreme Court of a constitutional nature are two-fold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the 14th Amendment of the Constitution of the United States; second, that the law, being applicable only to mines where more than ten men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws, within the inhibition of the same Amendment.

That the Constitution of the United States, in the 14th Amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business, against hostile State legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277. But, in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced. Some of them are collected in Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, in which it was held that the hours of work in mines might be limited.

In Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees, did not conflict with any provisions of the Constitution of the United States, protecting the right of contract.

In Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, the act of Congress prohibiting attorneys from contracting for a larger fee than $10 for prosecuting pension claims was held to be a valid exercise of police power.

In Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, a statute of California, making it unlawful for employees to work in laundries between the hours of 10 p. m. and 6 a. m. was sustained.

The statute fixing maximum charges for the storage of grain, and prohibiting contracts for larger amounts, was held valid. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

In Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821, this court held that an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance was held to be valid.

In Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, this court summarized the doctrine as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State; and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

In Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, this court said:

"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health, and welfare of the people.

It is also true that the police power of the State is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. Jacobson v. Massachusetts, supra; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government.

We take it that there is no dispute about the fundamental propositions of law which we have thus far stated; the difficulties and differences of opinion arise in their application to the facts of a given case. Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law? Looking to the law itself, we find its curtailment of the right of free contract to consist in the requirement that the coal mined shall not be passed over any screen where the miner is employed at quantity rates, whereby any part of the value thereof is taken from it before the same shall have been weighed and credited to the employee sending the same to the surface; and the coal is required to be accounted for according to the legal rate of weights, as fixed by the law of Arkansas, and contracts contrary to this provision are invalid. This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week, or month; it does not prevent the operator from rejecting coal improperly or negligently mined, and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

While such laws have not been uniformly sustained when brought before the State courts, the legislatures of a number of the States have deemed them necessary in the public interests. Such laws have been passed in Illinois, West Virginia, Colorado, and perhaps in other States. In Illinois they have been condemned as unconstitutional. Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364. The same conclusion has been reached in Colorado, citing and following the Illinois case, Re House Bill No. 203, 21 Colo. 27, 39 N. E. 431.

In West Virginia, while at first sustained by a unanimous court, such an act was afterwards, upon rehearing, maintained by a divided court. State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000.

We are not disposed to discuss these State cases. It is enough for our present purpose to say that the legislative bodies of the states referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary. * * *

The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing ten or more men. * * *

There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the State employing more than ten men under ground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity. The judgment of that court is affirmed.

Dissenting: MR. JUSTICE BREWER and MR. JUSTICE PECKHAM.

LOCHNER v. NEW YORK.

198 U. S. 45, 25 Sup. Ct. 539. 1905.

This is a writ of error to the county court of Oneida county, in the State of New York (to which court the record had been remitted), to review the judgment of the court of appeals of that State, affirming the judgment of the Supreme Court, which itself affirmed the judgment of the county court, convicting the defendant of a misdemeanor on an indictment under a statute of that State, known, by its short title, as the labor law. * * *

The indictment averred that the defendant "wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread, and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week," after having been theretofore convicted of a violation of the same act; and therefore, as averred, he committed the crime of misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not constitute a crime. The demurrer was overruled, and, the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of $50, and to stand committed until paid, not to exceed fifty days in the Oneida county jail. A certificate of reasonable doubt was granted by the county judge of Oneida county, whereon an appeal was taken to the appellate division of the Supreme Court, fourth department, where the judgment of conviction was affirmed. 73 App. Div. 120, 76 N. Y. Supp. 396. A further appeal was then taken to the court of appeals, where the judgment of conviction was again affirmed. 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373.

MR. JUSTICE PECKHAM, after making the foregoing statement of the facts, delivered the opinion of the court:

The indictment, it will be seen, charges that the plaintiff in error violated the 110th section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the supreme court or the court of appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute, that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct Rep. 427. Under that provision no State can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or State Government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of State statutes thus assailed. Among the later cases where the State law has been upheld by this court is that of Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in Holden v. Hardy which covers the case now before us. Nor does Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, touch the case at bar. The Atkin Case was decided upon the right of the State to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, is equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of Jacobson v. Massachusetts, decided at this term and reported in 197 U. S. 11, 25 Sup. Ct. Rep. 358. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." That case is also far from covering the one now before the court.

Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the State courts. In the Supreme Court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the court of appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the court of appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the court of appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a banker, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash rooms and water closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting, the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias,* over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthy, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare. * * *

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the court of appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Reversed.

[JUSTICES HOLMES, HARLAN, WHITE and DAY dissented.]

Power of State Over Commerce Under Police Power.

MUNN v. ILLINOIS.

94 U. S. 113. 1876.

Error to the Supreme Court of the State of Illinois.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative powers of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of § 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States."

2. To that part of § 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"; and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the National Government, and by the Fourteenth, as a guarantee against any encroachments upon an acknowledged right of citizenship by the legislatures of the States. * * *

When one becomes a member of society he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe v. R. & V. Railroad Co., 27 Vt., 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How., 583, "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartment, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sec. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation. * * *

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiff in error. From these it appears that "the great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern port, * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe, * * * The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must be also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he * * * take but a reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. * * *

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the state from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall., 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to-wit, that the statute in its present form is repugnant to sec. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

[MR. JUSTICE FIELD rendered a dissenting opinion, in which MR. JUSTICE STRONG concurred.]

Executive Department—Due Process of Law.

UNITED STATES v. JU TOY.

198 U. S. 253, 25 Sup. Ct. 644. 1905.

On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit presenting the question whether habeas corpus should be granted in behalf of a person of Chinese descent whose right to enter the United States has been denied by the immigration officers and affirmed on appeal by the Secretary of Commerce and Labor, and citizenship is the only ground alleged as making the detention unlawful, and whether, under such circumstances, the writ should be dismissed or a further hearing be granted, and whether the decision of the Secretary of Commerce and Labor is conclusive, in the absence of abuse of authority.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the steamship Doric for return to China, presented a petition for habeas corpus to the district court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor.

* * * * * * * * *

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of United States v. Sing Tuck, 194 U. S. 161, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621: "A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect. But, as it was entertained, and the district court found for the petitioner, it would be a severe measure to order the petitioner to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in United States v. Sing Tuck, 194 U. S. 161, 167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621, that the act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, § 1, U. S. Cont. Stat. 1901, p. 1303), purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 97, 47, L. ed. 721, 724, 23 Sup. Ct. Rep. 611, 613, it was said: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also United States ex rel. Turner v. Williams, 195 U. S. 279, 290, 291, 48 L. ed. 979, 983, 984, 24 Sup. Ct. Rep. 719; Chin Bak Kan v. United States, 186 U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891. In Fok Yóung Yo v. United States, 185 U. S. 296, 304, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967, where the petition for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts. United States v. Sing Tuck, 194 U. S. 161, 167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621; Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967. It is also established by the former case and others which it cites that the relevant portion of the act of August 18, 1894 [28 Stat. at L. 372] chap. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 565; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed. 318, 319; United States v. Harris, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. Ct. Rep. 601; Poindexter v. Greenhow, 114, U. S. 269, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Baldwin v. Franks, 120 U. S. 678, 685-689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; Smiley v. Kansas, 196 U. S. 447, 455, ante, 289, 25 Sup. Ct. Rep. 289. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. Re Ross (Ross v. McIntyre), 140 U. S. 453, 464, 35 L. ed. 581, 586, 11 Sup. Ct. Rep. 897. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the 5th Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekiu v. United States, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336, and in Fong Yue Ting v. United States, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016, before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 15 L. ed. 372, 376, to show that the requirement of a judicial trial does not prevail in every case. Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967; Japanese Immigrant Case (Yamataya v. Fisher), 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611; Public Clearing House v. Coyne, 194 U. S. 497, 508, 509, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

It will be so certified.

[JUSTICES BREWER, PECKHAM and DAY dissented.]

Suspension of Habeas Corpus.

EX PARTE MILLIGAN.

4 Wall. 2 (U. S.). 1866.

This case came before the court upon a certificate of division from the judges of the Circuit Court of Indiana, on a petition for discharge from unlawful imprisonment. * * * [The facts are sufficiently stated in the opinion of the court.]

MR. JUSTICE DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having prior thereto discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offense whatever; and in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever, because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus be issued?"

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the Government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation. * * *

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury"; and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. * * *

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the Government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The Government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offenses, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the Government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said, arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to the various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,"—language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the Government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. * * *

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the Government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion an answer in the negative must be returned.

CHAPTER VI.

IMPAIRMENT OF OBLIGATION OF CONTRACTS.

Charter Contracts.

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

4 Wheat. 518 (U. S.). 1819.

MARSHALL, C. J., delivered the opinion of the court, as follows:

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the State court of New Hampshire for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the Constitution of the United States? * * *

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of

New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members ex-officio. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are:

1. Is this contract protected by the Constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

[It was claimed that the funds of the college were public property, and the act of incorporation was a grant of political power. In regard to this the court said:]

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth and any others," the charter was granted, and the Trustees of Dartmouth College were by that name created a body corporate, with power, for the use of said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In cases of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. * * *

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary,—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country?

* * * * * * * * *

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation. * * *

The opinion of the court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointment and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

* * * * * * * * *

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

[JUSTICES WASHINGTON and STORY delivered concurring opinions. JUSTICE JOHNSON concurred for the reasons stated by the CHIEF JUSTICE; JUSTICE LIVINGSTON concurred for the reasons stated by the CHIEF JUSTICE and JUSTICES WASHINGTON and STORY. JUSTICE DUVALL dissented.]

LEADING ILLUSTRATIVE CASES CONSTITUTIONAL LAW

PART IV

EMINENT DOMAIN

CHAPTER I.

THE LIMITS OF THE POWER.

KOHL v. UNITED STATES.

91 U. S. 367. 1875.

[This was a proceeding instituted by the United States in the Circuit Court of the United States for the Southern District of Ohio to appropriate a parcel of land in the city of Cincinnati as a site for a post office, custom house, internal revenue and pension offices, United States depository, and for the accommodation of the United States courts. The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated, and moved to dismiss the proceeding on the ground of want of jurisdiction. The motion was overruled and the case brought on writ of error to the Supreme Court of the United States.]

STRONG, J., delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority can prevent the acquisition of the means or instruments by which alone government functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories and arsenals, for navy yards and lighthouses, for custom houses, post offices and court houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. * * * But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to take lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. * * *

But it is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. * * * The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under authority of any act of Congress, are plaintiffs. * * * The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it is not, within the meaning of the statute, a suit at common law when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided. * * *

The judgment of the Circuit Court is Affirmed.

CHAPTER II.

WHAT CONSTITUTES A TAKING.

TRANSPORTATION COMPANY v. CHICAGO.

99 U. S. 635. 1878.

[The facts sufficiently appear in the opinion.]

STRONG, J., delivered the opinion of the court.

We are of opinion that no error has been shown in this record, though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passageway along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the city they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended that there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's property, was not necessary, indeed indispensable, for the construction of the tunnel.

The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large, and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction. * * *

It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the State, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. * * * The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature gives. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Co., 13 Wall. 166, and in Eaton v. Boston, Concord & Montreal Railroad Co., 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient. * * *

We have examined the decisions of the courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence, or want of skill in causing the obstruction.

Additional Servitudes.

STORY v. NEW YORK ELEVATED RAILROAD CO.

90 N. Y. 122. 1882.

[Action to restrain the defendant from constructing an elevated railroad in a street upon which plaintiff's premises abutted. The construction of the railroad was authorized by a statute which made no provision for compensation.]

TRACY, J. The principal question to be determined in this case is, has the plaintiff's property been taken for public use within the meaning of the constitution of this state?

The plaintiff contends that by the true construction of the deeds from the city to his original grantors the bed of Front (then Water) Street was included in the grant, and that he is now the owner of one-half of the bed of Front Street in front of his lots. But if this claim be not sustained, then he insists that, in the original grants of the premises in question, the city of New York covenanted with his grantors that Front Street should be and remain an open street forever. That this covenant, being for the benefit of the abutting lands, is one running with the land, and the right or privilege secured thereby constitutes property within the meaning of article 1, § 6 of the Constitution, which provides that "private property shall not be taken for public use without just compensation." * * *

The defendant insists, and the trial court found, that, by the true construction of the deed, the bed of Front Street was excepted therefrom, and never passed to the plaintiff's original grantors. * * * Assuming the construction placed upon the grant by the court below to be correct, we have to consider the effect of such a covenant in a grant of land made by a municipal corporation having authority to lay out and open streets, and to acquire lands for that purpose. * * * By the law of this state as interpreted and held by its highest courts for the last fifty years, without criticism or doubt, the grantees of the city by force of their grant acquired the right to have Front Street kept forever as a public street. The street thus became what is known to the law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street attached to the lots abutting thereon, and passed to the plaintiff as the owner of such lots. That an easement is property cannot be doubted.

* * *

The next question to be considered is, has the plaintiff's property been taken by the defendant within the meaning of the constitution of this state? To constitute such a taking it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured or abridged by such appropriation. Has the plaintiff's easement in Front Street been destroyed, or injured, by the appropriation of the street to the uses of the defendant's road? As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public uses of the street.

This brings us to the question whether the occupation of the street by the defendant's road is compatible with, or destructive of, its use as a public street. * * *

The court below found that the series of iron columns abridges the street, and the superstructure erected thereon obscures the light to the adjoining premises, and depreciates the value of the plaintiff's property.

The extent to which plaintiff's property is appropriated is not material; it cannot, nor can any part of it, be appropriated to the public use without compensation.

We think such a structure closes the street *pro tanto* and thus directly invades the plaintiff's easement in the street as secured by the grant of the city. * * *

We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front Street, which entitled him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front Street, and which it has since erected, is inconsistent with the use of Front Street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character—and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front Street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.

Waters and Water Rights.

GARDNER v. TRUSTEES OF NEWBURGH.

2 Johns. Chan. 162 (N. Y.). 1816.

[Bill by the owner of land through which a small unnavigable watercourse ran to enjoin the defendants from diverting the water of the stream. The defendants were authorized by statute to divert the waters of the stream to furnish a water supply to the village of Newburgh, but no provision for compensation to riparian owners was included in the statute.]

THE CHANCELLOR (KENT). The statute under which the trustees of the village of Newburgh are proceeding (sess. 32, chap. 119) makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended that he should be deprived of it, without his consent, or without making him a just compensation. The Act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a watercourse is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy.

* * *

In the application of the general doctrines of the court to this case, it appears to me to be proper that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to anyone to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in Magna Charta and which the legislature has incorporated into an Act declaratory of the rights of the citizens of this state. * * * Injunction granted.

CHAPTER IV.

THE PUBLIC USE.

OPINION OF THE JUSTICES.

204 Mass. 607. 1910.

[The House of Representatives passed an order requiring the opinion of the Justices of the Supreme Judicial Court upon the following question (in substance): if the commercial interests and general prosperity of the inhabitants of the Commonwealth and particularly of the city of Boston are dependent upon the existence in that city of facilities for the transaction of foreign and domestic trade and commerce, and chief among such facilities is a broad thoroughfare with adequate sites upon it for warehouses and other buildings, and no such street exists, and if such a street should be laid out in the ordinary way the adjoining land would be left divided into parcels of such unsuitable size and shape, that the proper facilities could not be furnished by the mere laying out of a street, but could only be secured by the concentration through the exercise of eminent domain of estates abutting thereon into parcels of suitable size and shape, is it within the constitutional power of the legislature to authorize the taking by the city of land for such a thoroughfare and of so much land on both sides thereof as may be reasonably necessary to furnish the proper facilities and with a view to subsequent use of such land by private individuals in such manner as to secure the public interests referred to.]

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the question submitted to us, a copy of which is hereto annexed, and we answer it as follows:

The question relates to the proposed laying out of a thoroughfare or street through a part of the city of Boston. The power of the city, by its officers, to lay out and construct a street or thoroughfare in any place within the city, or of any width or mode of construction, if it is found that the public necessity and convenience require it, is undoubted. * * *

The question seems to relate particularly to the power of the legislature to take and use land outside of the proposed thoroughfare, for purposes which have no direct relation to the construction or use of the street for travel. It is presented upon the hypothesis that the desired facilities for the profitable use of the land can be secured only by the obliteration in whole or in part of the present lines of individual ownership along the street, the concentration, through the exercise of the power of eminent domain, of these abutting estates, in parcels of suitable size and shape, and the development or use of such parcels for warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The question is whether such land can be taken with a view to the subsequent use of it by private individuals, under conveyances, leases or agreements which shall embody suitable contracts for the construction on the land of buildings adapted to use in domestic and foreign trade and commerce, and for the use, management and control of the lands and buildings in such manner as to secure and promote such trade and commerce. The proposed legislation, to which the inquiry relates, necessarily would contemplate action by the city in the procurement, management and control of land along a street within the city, for no other purpose than to induce and promote a use of it by merchants or traders. It would contemplate a taking of private property in the exercise of the right of eminent domain, and an expenditure of money to pay for it and fit it for occupation.

It is a rule of law universally recognized in this country that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside the functions of a state or of any subdivision of a state.

It is equally true and indubitable that a management and use of such property to promote the interests of merchants and traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use of the real estate. In Lowell v. Boston, 111 Mass. 454, after the great fire of 1872, which destroyed all the buildings in an important part of Boston, it was decided that a statute authorizing the city to borrow money on bonds and lend it on mortgages to the owners of land whose buildings had been burned, was unconstitutional. The lending of such money presumably would have promoted building and the transaction of business in the devastated district, but the benefit to the public would not have been direct, but only incidental. The court said, speaking by Mr. Justice Wells, at p. 461: "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprise or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." This statement of the law is clear and accurate. It has governed all later decisions upon kindred questions in this commonwealth. * * * It is the law of the Supreme Court of the United States as laid down in an able and exhaustive opinion by Mr. Justice Miller in Loan Association v. Topeka, 20 Wall. 655,* in which

* See Leading Illustrative Cases, Taxation.

it was held that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise was invalid. It has been followed by that court in later cases. * * * It has been applied in different forms in a variety of cases in courts all over the United States. * * *

An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds. * * *

We answer the question in the negative.

CHAPTER V.

JUST COMPENSATION.

BAUMAN v. ROSS.

167 U. S. 548. 1896.

[This was a petition of the Commissioners of the District of Columbia for the condemnation of a permanent right of way over certain lands under a statute, § 11 of which provided that "where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury, in assessing the damages therefor, shall take into consideration the benefit (that) the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the same, and shall give their verdict accordingly." The Court of Appeals of the District of Columbia held that this provision was unconstitutional and the Commissioners appealed to the Supreme Court of the United States.]

GRAY, J., delivered the opinion of the court.

* * * The effect of the decision of the Court of Appeals is that the owner of a parcel of land, a right of way over part of which is condemned under this statute, is entitled to recover the full value of the part taken, free of any deduction for special benefits to the remainder, or of any assessment for the general benefits received by it in common with other lands in the neighborhood. * * *

The power of Congress, exercising the right of eminent domain within the District of Columbia, to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, does not appear ever to have been judicially questioned until it was denied by a majority of the Court of Appeals of the District of Columbia within the last two or three years. * * *

The position thus assumed by a majority of that court is not only against the course of previous legislation and decision in the District of Columbia, but is opposed to the great preponderance of the authorities elsewhere.

In the Fifth Article of the earliest amendments to the Constitution of the United States, in the nature of a Bill of Rights, the inherent and necessary power of the government to appropriate private property to the public use is recognized, and the rights of private owners are secured by the declaration "nor shall private property be taken for public use without just compensation."

The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, "is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised, except upon condition that just compensation shall be made to the owner; and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." Searl v. Lake County School District, 133 U. S. 553, 562. The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

* * *

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and for the reasons and upon the authorities above stated no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening either the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable compensation, caused by the establishment of the highway to the part not taken.

CHAPTER VII.

PROCEDURE.

The Measure of Damages—Evidence.

SHARP v. UNITED STATES.

191 U. S. 341. 1903.

[Proceedings for the assessment of damages by the taking of one of three tracts of land owned by the plaintiff in error for fortification purposes. After an award was made by a jury, and judgment affirmed by the Circuit Court of Appeals, the owner brought the case to the Supreme Court of the United States on writ of error. The other facts sufficiently appear in the opinion.]

PECKHAM, J., delivered the opinion of the court.

* * * It was held by the trial court, in response to the proposal to give such evidence, that the plaintiff in error could not testify to different offers he had received to purchase the property for hotel, residential or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes.

Upon principle we think the trial court was right in rejecting this evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. * * * Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. * * * In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject. * * *

The owner offered to prove the probable use the government would make of the land for military purposes for which it was taken; also that the use of the land for such military purposes would damage and depreciate the remaining and adjoining land; also that if the land to be taken was used by the government for military purposes it would endanger the adjoining land of the owner for a long distance and make the removal of his buildings necessary. * * * The important question is as to the admissibility of evidence of damages to the remaining lands of the owner which would probably flow from any particular and probable use by the government of the land to be taken. It is said by the plaintiff in error that just compensation consists not only in an award of the value of the lands which are taken, but also any damage that may result to the portion of the tract which remains, on account of such taking and on account of the uses to which the land taken may, or probably will, be put, and he cites many cases to show the correctness of the rule which he asserts.

Its correctness may be conceded, but what we have to decide is whether the facts in this case bring it within the rule itself. * * * The map contained in the record shows a highway between these tracts. From all the evidence which can be gathered from the record it plainly appears to us that these tracts of land were absolutely separate and independent farms, having no necessary relation with each other, and the farming on each had been conducted separately, and each farm had its own house and outbuildings. * * * It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the land owner is entitled to receive for his lands and damages thereto must be limited to the tract a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance. It is enough to say that, in our opinion, the two other farms or tracts of land owned by plaintiff in error constituted such separate and independent parcels as regards the land in question that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken. * * *

Although denying the right to recover certain alleged damages to the land remaining, the court was not illiberal in the rules it adopted for ascertaining the compensation due for the taking of the land. It permitted the jury to consider not only the purposes to which the land taken had been put, but also as bearing upon its value, the jury was directed to consider evidence as to the adaptability of the land for other than merely agricultural purposes; that while no merely speculative value was to be placed on the land, this possible adaptability was to be considered, and if in the judgment of the jury it was probable that the improvements which had been spoken of in the testimony would within some reasonable time be made, that was an element which might enter into their calculation in forming their estimate of the value of the land.

Therefore the jury was permitted to take into consideration the future possible building of a railroad in the neighborhood which would pass within a mile or so of Fort Mott, although no steps had yet been taken to build it; still as there had been some talk of building it, and the railroad might thereafter be built, the jury were instructed that if they thought from the evidence it would be built within a reasonable time, and that if built it would enhance the value of the property, they might take that fact into consideration as giving the then present actual value beyond that of an ordinary farm.

The same instructions were given in relation to a trolley road which it was supposed might be built to run near this land. The jury was also permitted to consider the adaptability of the land for a hotel or cottage sites. * * *

Upon a consideration of the whole record, we think there was no error committed upon the trial of the case before the jury.

* * *

LEADING ILLUSTRATIVE CASES CONSTITUTIONAL LAW

PART V

TAXATION

CHAPTER I.

THE POWER OF TAXATION.

Distinction Between Direct Taxes and Excises in the Federal Constitution.

POLLOCK v. FARMERS' LOAN AND TRUST CO.

158 U. S. 601. 1895.

[This was a bill by a stockholder in the defendant corporation to restrain it from paying to the United States a tax of two per cent on its net profits, including the income from real estate and municipal bonds, alleging that the act of Congress establishing such tax was unconstitutional.]

On April 8, 1895, the court, one justice being absent decided: "A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

"A tax upon incomes derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

"Upon each of the other questions argued at bar, to wit: 1. Whether the void provision as to rent and income from real estate invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—the Justices who heard the argument are equally divided, and, therefore, no opinion is expressed." (157 U. S. 429.)

A rehearing was granted.

The cases were re-argued before the full bench, and on May 20, 1895, the following opinion was rendered:

FULLER, C. J., delivered the opinion of the court.

* * * As heretofore stated, the Constitution divided federal taxation into two great classes, the class of direct taxes and the class of duties, imposts, and excises, and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited, was whether such taxation was direct or not, in the meaning of the Constitution, and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents or products or otherwise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense and to have a reasonable construction. In Gibbons v. Ogden, Chief Justice Marshall, with his usual felicity, said:

"As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they have said." 9 Wheat. 1, 188. * * *

We know of no reason for holding otherwise than that the words "direct taxes" on the one hand, and "duties, imposts, and excises" on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. * * *

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be only one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we conceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." * * *

Nor are we impressed with the argument that because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax, nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt as expressed in his celebrated speech on introducing his income-tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the holder had no reason to complain. And this, said Mr. Gladstone fifty-five years after, was the rational construction of the pledge. Financial Statements, 32. * * *

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. * * *

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the state, and collect the same if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798 (C., 75, 1 Stat. 597)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable. * * *

The power to tax real and personal property and the income from both, there being an apportionment, is conceded; that such a tax is a direct tax in the meaning of the Constitution has not been, and, in our judgment, cannot be successfully denied; and yet we are thus invited to hesitate in the enforcement of the mandate of the Constitution which prohibits Congress from laying a direct tax on the revenue from property of the citizen without regard to state lines, and in such manner that the states cannot intervene by payment in regulation of their own resources, lest a government of delegated powers should be found to be, not less powerful, but less absolute, than the imagination of the advocate had supposed.

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and commercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare. * * *

We have considered the act only in respect to the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole. * * *

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by §§ 27-37, inclusive, of the Act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

HARLAN, BROWN, JACKSON and WHITE, JJ., delivered dissenting opinions.

CHAPTER II.

TAXATION BY THE UNITED STATES AND OF UNITED STATES PROPERTY.

Taxation of the Property and Instrumentalities of the United States.

McCULLOCH v. MARYLAND.

4 Wheaton 316 (U. S.). 1819.

[This was a suit in the courts of Maryland, by that state against plaintiff in error, as cashier of the Baltimore branch of the Bank of the United States, to recover taxes claimed to be due under a statute of Maryland. Defendant questioned the validity of such statute, and from the judgment against him, brought the case to this court by writ of error.]

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty. * * *

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire: * * *

2. Whether the state of Maryland may, without violating the Constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. * * *

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it. * * *

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. * * *

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. * * *

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. * * *

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This case came on to be heard on the transcript of the record of the court of appeals of the state of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the Constitution of the United States, and void. * * * The judgment of the Supreme Court of Maryland is therefore Reversed.

CHAPTER III.

THE TAXATION OF FOREIGN AND INTERSTATE COMMERCE.

Duties on Imports—The Taxation of Interstate Commerce.

BROWN v. MARYLAND.

12 Wheaton 419 (U. S.). 1827.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts or duties on imports or exports"?

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the object, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. * * *

The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * *

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reëxported in the same vessel, goods landed and carried overland for the purpose of being reëxported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties. * * *

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerout extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no further than to prevent the states from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.

It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country, so to import means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or thing imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no state shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress.

It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of Gibbons v. Ogden, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned. * * *

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce.

It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one part to another, for the purpose of reëxportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given. * * *

We think there is error in the judgment of the Court of Appeals of the State of Maryland. * * *

The judgment is to be Reversed. * * *

THOMPSON, J., dissented.

CHAPTER V.

THE PUBLIC USES FOR WHICH TAXES CAN BE LEVIED.

LOAN ASSOCIATION v. TOPEKA.

20 Wallace 655 (U. S.). 1874.

[The city of Topeka under authority of an act of the legislature of Kansas issued one hundred bonds for one thousand dollars each as a donation to a certain iron-works company to encourage it to establish a factory in Topeka. The purpose of the bonds appeared on their face. Plaintiff was a purchaser for value and brought suit on interest coupons in the Circuit Court for the District of Kansas. The defendant demurred, its demurrer was sustained and judgment given in its favor, and the plaintiff brought the case on writ of error to the Supreme Court of the United States.]

MILLER, J., delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by § 5 of article 12 of the constitution of that state it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the state courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the circuit court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose.

It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that state to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the state of Kansas.

We have already said the question is not new. The subject of the aid voted to railways by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation. * * *

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued, could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. The State of Maryland, 4 Wheaton 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent., imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley, Constitutional Limitations, p. 479.

Coulter, J., in Northern Liberties v. St. John's Church, 13 Pennsylvania State 104, says, very forcibly: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. * * *

Judgment affirmed.

CLIFFORD, J., delivered a dissenting opinion.

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CONSTITUTIONAL LAW

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